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Why is Torture Different and How Different Is It?

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WHY IS TORTURE “DIFFERENT” AND HOW “DIFFERENT” IS IT?

*Sherry F. Colb**

ABSTRACT

Almost every serious commentator to address the moral and legal question of torture has taken for granted the proposition that the infliction of torture is a sufficiently grave evil to require a distinctly demanding moral scrutiny, one that categorically sets torture apart from other terrible things (including killing) that human beings do to one another. To borrow from the Supreme Court’s death penalty jurisprudence, most people agree that torture is “different.”

Under the Eighth Amendment, the fact that death is different does not rule out its application; it simply alters the relevant procedural and substantive standards. By contrast, many scholars believe torture should be entirely out of the question, and positive law gives effect to this view. This Article asks why. Why does torture merit its own moral category when killing does not?

The Article asks first whether torture is in fact “different” at all. To this end, the Article sets out a novel hypothetical case in which a torturer acts in true self-defense. It thereby demonstrates that when circumstances are truly identical, and the “self-defense” characterization is accurate, the use of torture becomes no more

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troubling than the use of lethal force.

The Article then turns to the “ticking bomb” scenario and asks what makes this case different enough from genuine self-defense to engender such division among those who support the right to justifiable homicide. Having demonstrated that the difference between torture and killing fails to account for the distinction, the Article develops a series of hypothetical examples that produce three criteria that will justify the use of torture and/or lethal force: First, torture or killing must be used against a wrongdoer; second, the force must be an effective means of saving innocents; and third, the status of the person to be killed or tortured as a wrongdoer must be closely tied to the utility of selecting him. It cannot, in other words, be a coincidence that the person whose torture will save lives also happens to be a wrongdoer.

Unlike other work on the subject of torture, this Article does not attempt to persuade the reader of the legality, illegality, morality, or immorality of torture under particular circumstances. Instead, it attempts to explain the nature of the debate and shed light on its evident intractability. The Article concludes that disagreements over the morality of torture are likely to persist because one can make a reasonably persuasive case both for and against the satisfaction of the third criterion I unearth—the tightness of fit between a subject’s wrongdoing and the utility of torturing him—in the case of the “ticking bomb” case.

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INTRODUCTION

Whether torture is ever justifiable is, to put it mildly, controversial. In the age of global terrorism, one can easily imagine scenarios in which torture could mean the difference between life and death for innocent civilians. Numerous scholars have weighed in on this issue, and those who disagree with one another often have difficulty remaining civil in their discourse.¹

Nonetheless, a common assumption underlies virtually everything that moral theorists say on the subject—the assumption that “torture is different.” Nearly everyone assumes that unlike other things that people do to one another (including killing each other in ways that knowingly—though not deliberately—cause the same sorts of excruciating pain as torture does), torture demands a different form of analysis. While there are pacifists,² who oppose all violence, many absolute opponents of torture—such as Amnesty International—are not

¹ E.g., Desmond Manderson, *Another Modest Proposal*, 10 DEAKIN L. REV. 640, 651-52 (2005) (“Torture is wrong under all circumstances, not because it leads to certain bad outcomes, but for no reason: simply and inherently. . . . In fact, to look for reasons . . . is a sign of psychopathy.”); Anne O’Rourke, Vivek Chaudhri & Chris Nyland, *Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 85, 101 (2005) (“The paucity of academic rigor in [Bagaric and Clarke’s] reasoning is disappointing.”); Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 257, 265 (Sandford Levinson ed., 2004) [hereinafter TORTURE: A COLLECTION] (“Instead of engaging me in a nuanced debate . . . critics of my proposal have accused me of ‘circumventing constitutional prohibitions on torture,’ giving ‘thumbs up to torture,’ ‘proposing torture for captured terrorist leaders,’ . . . and ‘advocating . . . shoving a sterilized needle under the fingernails of . . . subjects being interrogated.’”); Heather MacDonald, *How to Interrogate Terrorists*, in THE TORTURE DEBATE IN AMERICA 84, 96 (Karen J. Greenberg ed., 2006) [hereinafter TORTURE DEBATE] (“Human Rights Watch, the ICRC, Amnesty International, and the other self-professed guardians of humanitarianism need to come back to earth, to the real world in which torture means what the Nazis and the Japanese did in their concentration and POW camps in World War II; the world in which evil regimes, like those we fought in Afghanistan and Iraq, don’t follow the Miranda rules or the Convention Against Torture . . .”).

² See, e.g., DONALD WETZEL, PACIFIST: OR, MY WAR AND LOUS LEPKE (1986); THOMAS TRZYNA & RICHARD A. KAUFFMAN, BLESSED ARE THE PACIFISTS: THE BEATITUDES AND THE JUST WAR THEORY (2006).

pacifists.³ Yet there seems to be a broad consensus that torture is different and that distinct rules ought to apply (whether those rules contemplate an absolute prohibition or an almost-absolute rule with a very limited exception for the threat of catastrophe).⁴

The “torture is different” view resembles the U.S. Supreme Court’s Eighth Amendment approach to capital punishment, which holds that “death is different.” This approach has come to mean that trial procedures which are constitutionally adequate in the case of a person threatened with prison become violations of the ban on “cruel and unusual punishments” when they might result in a death sentence. The defendant in a capital case has the right to insist, for example, that the jury be informed—if it is true—that “life imprisonment” does not allow for the possibility of parole.⁵ In addition, the proportionality principle of the Eighth Amendment—which is said to require that the punishment fit the crime—does not appear to have much application outside the capital context, though the Court is quite vigilant about proportionality when the penalty is death.⁶ Because the stakes are so high, because the proposed action is so extreme, the logic goes, we must be exceedingly

³ See *Seven Questions: A Walk on the Dark Side*, FOREIGN POLICY, May 2007, http://www.foreignpolicy.com/story/cms.php?story_id=3841 (“Amnesty is not a pacifist organization, and we do not take a position on military conflicts per se.”); Mitch Nauffts, *Ken Roth, Executive Director, Human Rights Watch: Human Rights in An Age of Terror*, PHILANTHROPY NEWS DIGEST, June 16, 2003, <http://foundationcenter.org/pnd/newsmakers/nwsmkr.jhtml?id=36500031> (“Human Rights Watch is not a pacifist organization.”); HUMAN RIGHTS WATCH, U.S. TORTURE AND ABUSE OF DETAINEES, <https://199.173.149.140/campaigns/torture.htm> (“Torture or other cruel, inhuman, or degrading practices should be as unthinkable as slavery.”); see also Michael Walzer, *Political Action: The Problem of Dirty Hands*, in TORTURE: A COLLECTION, *supra* note 1, at 61, 65 (“Augustine did not believe that it was wrong to kill in a just war; it was just sad, or the sort of thing a good man would be saddened by. But he might have thought it wrong to torture in a just war, and later Catholic theorists have certainly thought it wrong.”); U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs”). By regulating the conduct of war, moreover, the Geneva Conventions (which explicitly prohibit torture) implicitly recognize the potential legitimacy of a just war. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁴ By proposing that the ban on torture is an “archetype,” Jeremy Waldron, for instance, apparently agrees that torture is qualitatively distinct from other practices, for which exceptions may be permissible. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005).

⁵ *Simmons v. South Carolina*, 512 U.S. 154 (1994); see generally *Gregg v. Georgia*, 428 U.S. 153, 167 (1976) (espousing the view that “death is different” and holding that rules that have no application in ordinary criminal trials do apply in capital cases.).

⁶ Compare *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (invalidating death penalty for rape of a child), and *Coker v. Georgia*, 433 U.S. 584 (1977) (invalidating death penalty for rape of an adult woman), with *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence for possession of 672 grams of cocaine), and *Rummel v. Estelle*, 445 U.S. 263 (1980) (allowing life imprisonment for passing a bad check), and *Ewing v. California*, 538 U.S. 11 (2003) (upholding long sentence (25 to life) for committing three minor property felonies, under a Three Strikes law).

careful to ensure that whatever justification we propose truly is present, or, alternatively, we must prohibit the practice altogether, no matter what the circumstances are.

“Torture is different,” of course, goes well beyond “death is different.” For one thing, in the United States, capital punishment is not absolutely prohibited. Though the required procedures can be demanding, the government may lawfully execute at least some of the people convicted of crimes in this country. Torture, defined as the intentional infliction of severe pain or suffering,⁷ on the other hand, is never permissible as a punishment under U.S. law. This means, first, that although the government may kill people, it may not use excruciatingly painful methods to do so.⁸ And second, the Eighth Amendment prohibits use of such punishments as the rack and the screw for convicts, even if they will live to tell about it.⁹ Torture, accordingly, occupies an absolute status within American criminal law (and under international norms) that death—though “different”—does not similarly occupy.

Prohibitions against torture, moreover, extend to wartime and therefore necessarily contemplate a world in which people are permissibly killing one another, even when they know that some who die will be innocent non-combatants.¹⁰ The civilized world therefore places torture beyond death in the hierarchy of prohibited acts.

This Article explores what makes torture “different.” This includes, in part, a consideration of what it differs from. That is, when we say “death is different,” we mean that it is different, both

⁷ See U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, art. 1 G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (Dec. 10, 1984), available at http://www.unhcr.ch/html/menu3/b/h_cat39.htm [hereinafter Convention Against Torture] (“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”). For an explanation of why I adopt the definition of torture that I do, see *infra* Part I.B.

⁸ See *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (“[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”); see also *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) (explaining that the following punishments would violate the Eighth Amendment: drawing and dragging a prisoner to the place of execution; disemboweling a prisoner alive and beheading him; publicly dissecting a prisoner; and burning him alive).

⁹ See, e.g., *Hope v. Pelzer*, 536 U.S. 730 (2002) (tying a prisoner to a hitching post as part of his punishment violated the Eighth Amendment); *Whitley*, 475 U.S. at 319.

¹⁰ See John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in *TORTURE: A COLLECTION*, *supra* note 1, at 145, 149.

procedurally and substantively, from other forms of permissible punishment in the United States, such as fines and imprisonment. But what do we mean when we say that *torture* is different? And what accounts for that difference? I consider various possibilities—mostly through thought experiments—and conclude that existing analyses of what makes it different do not adequately explain that difference.

To show that torture is not inherently objectionable under all circumstances, I pose a hypothetical example about an assailant who unjustifiably attempts to kill a victim. I demonstrate that if the victim of such an attempted murder can torture rather than kill her attacker to make him stop his lethal attack, she is unambiguously justified in doing so, as a matter of self-defense. Whatever it is that makes torture morally or legally “different,” then, must turn on the circumstances that trigger its use rather than on the simple fact that one is using torture.

Through examples of justified and unjustified killing, I identify three requirements that must accompany the defensible use of torture. First, the person to be tortured must be a wrongdoer. Second, torture must be used to save lives. And third, there must be a close connection between the identity of the tortured party as a wrongdoer and the utility of the act of torture in saving lives. As we will see, this connection is tightest in the case of true self-defense.

Following this introduction, Part I surveys the existing range of views regarding the morality of torture and then describes my methodology for entering the discussion. Part II compares torture to killing and demonstrates through a novel hypothetical example that a person who utilizes torture in *true* self-defense is morally no different from a person who *kills* in true self-defense. The Part goes on to identify how interrogational torture—even in extreme circumstances in which a terrorist refuses to disclose life-saving information about a bomb he has planted—is distinct from true self-defense. It does so by comparing two cases of killing to save a life, one of which qualifies as self-defense and the other of which does not. It proposes that justifiable torture (or killing) carries the three requirements introduced above, each of which self-defense torture (or killing) meets but interrogational torture may or may not meet, depending on how demanding one is about the third requirement. It is because such torture does not clearly meet (but also does not clearly fail to meet) the third requirement, I argue, that disagreements about this question are intractable. Part III explores the moral complexity of interrogational torture within the three-requirement framework. The next two Parts (IV and V) discuss two cases (one from real life and one from literature) that demonstrate why one might ban all torture despite its rare justifiability but why the question is not an easy one to answer.

I. ENTERING THE TORTURE DEBATE

A. *Torture in Context: The Moral Terrain*

This Part summarizes and briefly analyzes existing debate on the question of torture. My aim in surveying the range of views on this subject is thereby to identify precisely what the hard questions are and how we might best go about attempting to answer them.

When we debate the legitimacy of torture, the scope of argument is relatively narrow. Moral theorists tend to agree that nearly all instances of torture known to humankind are unjustifiable. Such instances include the conduct of the Spanish and Portuguese Inquisitions,¹¹ the Nazis during the second World War,¹² the French in Algeria,¹³ official acts during Argentina's dirty war,¹⁴ and the more recent, photographically documented, behavior of American soldiers at Abu Ghraib,¹⁵ along with what is generally thought to be routine conduct in regimes such as Egypt, Jordan, Syria, and Morocco, to which the U.S. has been accused of sending terrorist suspects in a practice known as "extraordinary rendition."¹⁶

Some of the strongest defenders of justifiable torture agree with its absolute opponents that most examples of torture—motivated by hatred, sadism, the desire for incriminating evidence, and a search for preventative information on a flimsy foundation—are indefensible.¹⁷

¹¹ See generally JOSEPH PÉREZ, *THE SPANISH INQUISITION: A HISTORY* (Janet Lloyd trans., Yale Univ. Press 2006) (2002).

¹² See generally VIVIEN SPITZ, *DOCTORS FROM HELL: THE HORRIFIC ACCOUNT OF NAZI EXPERIMENTS ON HUMANS* (2005).

¹³ See generally RITA MARAN, *TORTURE: THE ROLE OF IDEOLOGY IN THE FRENCH-ALGERIAN WAR* (1989); ALISTAIR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962* (2006).

¹⁴ See generally MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* (1998).

¹⁵ See generally MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004).

¹⁶ See Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 314 (2006) ("According to media reports, suspects are blindfolded, shackled and sedated before being transported by jet to the destination country where they are typically detained, interrogated, often tortured and sometimes killed. The most common destination is apparently Egypt, although renditions have occurred involving Jordan, Syria, Morocco and Uzbekistan, as well.").

¹⁷ See, e.g., Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581 (2005) [hereinafter Bagaric & Clarke I]; Mirko Bagaric & Julie Clarke, *The Torture Debate: Tortured Responses (A Reply to Our Critics): Physically Persuading Suspects Is Morally Preferable to Allowing the Innocent to Be Murdered*, 40 U.S.F. L. REV. 703, 704 (2006) [hereinafter Bagaric & Clarke II] ("We condone torture only in the lifesaving circumstances To our knowledge, no incidents of torture that have been committed would fall within our criteria.").

Even an unapologetic proponent of its permissibility under limited circumstances, describes torture as “monstrous.”¹⁸

Notwithstanding such wide consensus, the disagreements—though narrow—generate heated and angry debate. Roughly organized, one camp believes that torture is always and necessarily wrong.¹⁹ The duty to refrain from torture is absolute, on this approach, and may not bend, no matter how strong (or, as one commentator puts it, how “tempting”)²⁰ the interests on the other side. This is also the position of existing law, including the U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment,²¹ to which the United States is a signatory. It is, as well, the view of such NGOs as Human Rights Watch and Amnesty International.²² Even when faced with tragic hypothetical examples, their response is unconditional: no torture, ever.²³

In the other camp (which is itself composed of differing perspectives), people share the view that torture might be justifiable on rare occasions. Members of this camp are willing to entertain, as a thought experiment, the so-called “ticking bomb” scenario—a hypothetical case in which authorities have in custody a terrorist who has set a bomb that will imminently explode and kill many people unless the captors torture the terrorist into revealing where the bomb is, thereby saving the lives that would otherwise have been lost. Members of the second camp find themselves unwilling to say no to torture under the hypothesized circumstances.²⁴ In their view, faced with the prospect of the deaths of thousands of innocent lives, we may—and, by some accounts, must—torture the terrorist to save the civilians.

Though they share this impulse about the ticking bomb case,

¹⁸ Charles Krauthammer, *The Truth About Torture: It's Time to be Honest About Doing Terrible Things*, WKLY. STANDARD, Dec. 5, 2005, at 24 (“[T]here is no denying the monstrous evil that is any form of torture. And there is no denying how corrupting it can be to the individuals and society that practice it.”).

¹⁹ See Waldron, *supra* note 4, at 1714-15 (“Might we be willing to allow the authorization of torture at least in a ‘ticking bomb’ case . . . ? [M]y own answer to this question is a simple ‘No.’”); see also Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION, *supra* note 1, at 3 (voicing absolute opposition to torture under any and all circumstances); Andrew Sullivan, *The Abolition of Torture*, THE NEW REPUBLIC, Dec. 19, 2005, at 19 (same).

²⁰ See Waldron, *supra* note 4, at 1686.

²¹ Convention Against Torture, *supra* note 7; see also Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (1999).

²² HUMAN RIGHTS WATCH, *supra* note 3 (“Torture or other cruel, inhuman, or degrading practices should be as unthinkable as slavery.”).

²³ Dorfman, *supra* note 19, at 17. (“I can only pray that humanity will have the courage to say no, no to torture, no to torture under any circumstances whatsoever . . .”).

²⁴ See, e.g., Burt Neuborne et al., *Panel Discussion: Torture: The Road to Abu Ghraib and Beyond*, in TORTURE DEBATE, *supra* note 1, at 13, 21 (“If I actually believed . . . that somebody who was a prisoner under my control knew where there were weapons of mass destruction . . . that were going to be used shortly, I might change my view.”).

members of the second camp divide on the question of how that impulse should affect the legal status of torture. To prevent *unjustified* torture, some theorists who accept that torture is justified in the ticking bomb case nonetheless say that the law must categorically ban it.²⁵ Furthermore, once a justifiable act of torture occurs, those who support a ban divide on what the consequences for the torturer ought to be. On one view, the torturer must accept his punishment, as all brave practitioners of civil disobedience do as the price for justifiably violating the law under extreme circumstances.²⁶ A competing approach supports a torturer's access to a common law criminal defense such as necessity or self-defense.²⁷ And of those who find the ticking bomb scenario a compelling basis for torture, some would allow the law to reflect the justification directly. They might, for example, support a pre-ordained authorization or immunity from prosecution, such as the torture warrants advocated by Alan Dershowitz.²⁸ Still others not only view torture as justified in a variety of circumstances but understand the prohibitions against torture to apply very narrowly or not at all in the interrogational context.²⁹ The last of these approaches might fairly be characterized as demonstrating far less hostility to torture than all of the others do (and therefore, perhaps, as falling outside the categories I have identified of those who basically agree that torture is virtually always wrong).

Intriguingly, Alan Dershowitz refuses to say unequivocally that

²⁵ Sanford Levinson, *Contemplating Torture: An Introduction*, 23-42, in *TORTURE: A COLLECTION*, *supra* note 1, at 23, 30; see also Richard Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra* note 1, at 291-99.

²⁶ See Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION*, *supra* note 1, at 229, 240.

²⁷ See Parry, *supra* note 10, at 158 ("If torture provides the last remaining chance to save lives in imminent peril, the necessity defense should be available . . ."); Michael S. Moore, *Torture and the Balance of Evils*, 23 *ISR. L. REV.* 280, 343 (1989) (setting forth same proposition); see also Kai Ambos, *May a State Torture Suspects to Save the Life of Innocents?*, 6 *J. INT'L CRIM. JUST.* 261 (2008) (setting forth same proposition).

²⁸ Dershowitz, *supra* note 1, at 257 (proposing torture warrants to force higher-level officials to control a practice that we know will take place).

²⁹ For the argument that President-ordered torture is constitutionally protected from legal prohibition, pursuant to the Commander-in-Chief's authority to conduct the War on Terror, see Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), in *TORTURE DEBATE*, *supra* note 1, at 317, 328 [hereinafter Bybee Memo] ("In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts."); *id.* at 344 ("Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional."); *id.* at 351 (proposing justification defenses for interrogational torture); see also Memorandum from Daniel Levin, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to James B. Comney, Deputy Attorney Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> [hereinafter Levin Memo] (disagreeing with Bybee Memo's conclusions).

there are cases in which torture would be justified, though he claims that as a normative matter, he would like to see torture minimized or eliminated.³⁰ He is therefore the only major theorist who might actually fall into the first camp (of those who believe that torture is always wrong, no matter what the circumstances might be), while at the same time proposing a legal approach that explicitly tolerates some torture and does so both officially and *ex ante* (thus insulating the torturer from later prosecution). Perhaps it is the inherent tension between suggesting that something is categorically wrong, on the one hand, and proposing that it should nonetheless be officially sanctioned, on the other, that accounts for the strongly negative reception that Dershowitz's ideas have received in both the scholarly and general literature.³¹ It makes him an easy target for those, like William Shulz, who ask rhetorically whether Dershowitz would favor warrants authorizing official perjury, police brutality, and prison rape as well.³²

In addition to classifying commentators on their bottom-line assessment of torture and its proper legal status, we can also divide them along philosophical lines. There are those who concern themselves with maximizing collective wellbeing (utilitarians) and those who believe that some moral principles are important enough to trump even horrible consequences (deontologists) on both sides of the torture debate.

Deontologists who favor the absolutist position say that human dignity prohibits the torture of a single person, guilty or innocent, no matter what that torture could prevent—even if millions of innocent people could themselves be saved from torture or murder through that single act of torture.³³ As Dostoevsky's character Alyosha Karamazov says, in answer to a question from his brother Ivan, the torture of just one child would be unjustified even if it would bring everlasting joy to the rest of the world.³⁴

³⁰ See, e.g., Dershowitz, *supra* note 1, at 266 ("I am against torture as a *normative* matter, and I would like to see its use minimized." (emphasis in original)).

³¹ See Waldron, *supra* note 4, at 1686-87 ("[O]ur primary objection to torture ought to be . . . for the potential victims of the treatment that . . . Dershowitz . . . appear[s] to condone."); see Richard Posner, *The Best Offense*, THE NEW REPUBLIC, Sept. 2, 2002, at 28 ("But it is typical of Dershowitz's lack of restraint that . . . he [reveals his preferred method of torture].") (reviewing ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002)). Perhaps in part because of such negative assessments, Dershowitz has recently written a book that is far more critical of torture, even as a matter of constitutional law, than he had previously been. See ALAN M. DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT?: COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11* (2008).

³² William F. Shulz, *The Torturer's Apprentice: Civil Liberties in a Turbulent Age*, THE NATION, May 13, 2003 ("Why ought the police not be able, therefore, to apply for 'brutality warrants[.]' . . . 'testilying' warrants[.]' . . . [and] 'warrants to tolerate prisoner rape' . . . ?").

³³ See Waldron, *supra* note 4, at 1687, 1713; see also Dorfman, *supra* note 19.

³⁴ See Dorfman, *supra* note 19, at 15 ("I challenge you—answer. Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them

Utilitarian anti-torture absolutists believe that the net benefit of an absolute ban outweighs the net benefit of a ban with an exception, however narrowly crafted.³⁵ Though one could, in theory, present a hypothetical case in which this would not be true, the utilitarian absolutist believes we are ill-equipped to identify this scenario with sufficient precision to justify the consequences of “cross[ing] that . . . Rubicon” and authorizing torture.³⁶ In that sense, the absolutist could be described as a “rule” utilitarian, concerned with creating a rule that will lead to the best consequences overall, even if a more nuanced approach might—in theory—have better consequences in a particular case.

There are, conversely, deontologists, such as Michael Moore, who believe that torture is not only acceptable but morally compulsory under some circumstances because consequences can be grave enough to override even a strong moral principle such as that against torture.³⁷ Moore argues that we have a moral duty to intervene to prevent atrocities from occurring and that the terrorist who threatens thousands triggers that duty, even if it requires the Good Samaritan to commit an act of torture.³⁸ (Moore concludes, however, that a necessity defense, rather than a pre-authorization or immunity for torture, would be the appropriate vehicle for acknowledging this justification.)

And, too, there are utilitarians who believe that if torture results in the net saving of lives, it is at least sometimes morally permissible, and ought accordingly to be legally permissible (with the implicit assumption that torture could, in some instances, have such a result).³⁹

Most people outside the academy (and even within it, I would surmise) are hybrids. To make the notion of a hybrid concrete, consider a hypothetical person, Q. Q believes that one could justifiably torture a

peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature—that little child beating its breast with its fist, for instance—and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions?” (quoting FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV*). As I argue at length in the balance of this Article, it may or may not be significant that in Ivan Karamazov’s example, the torturee is an innocent (in fact, a baby).

³⁵ Henry Shue, *Torture*, in *TORTURE: A COLLECTION*, *supra* note 1, at 47-75.

³⁶ David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 *GEO. J. INT’L L.* 61, 84 (2005).

³⁷ Moore, *supra* note 27, at 297-98. I thank Robert Ferguson for raising the question whether Moore is actually taking a consequentialist position here, despite his ordinarily deontological inclinations. I think Moore would say in response that even if one could torture one person to save a few people, which—from a consequentialist point of view—would be appropriate, such an act would be absolutely prohibited. At some point, however, the consequences of inaction alter the strength of one’s moral duty to rescue others. That is, Moore could believe that consequences play a role in filling out the content of the action/inaction distinction, a distinction that is ordinarily very important to a deontologist but that perhaps becomes less significant as inaction tends increasingly toward a horrendous result.

³⁸ *Id.*

³⁹ See Bagaric & Clarke I, *supra* note 17, at 608-10.

terrorist who has set a bomb that will—if the terrorist is not compelled through torture to reveal its whereabouts—explode in a short time and kill thousands of people. Q does not, however, believe that one could justifiably torture the terrorist's *baby* to induce the terrorist to provide the very same information. The distinction between the two scenarios is primarily deontological—though the same number of people will live or die as a consequence of the decision whether or not to torture in each instance, the torture target in the second scenario *deserves* better treatment than the torture target in the first. I say *primarily* deontological because one could reasonably argue that the consequences of opening the door to the torture of innocents could do greater damage to the population's wellbeing than would the torture of a wrongdoer. Still, if we posit that no one will discover what happened, Q may believe that consequences notwithstanding, torturing the baby is simply much *worse* than torturing the guilty terrorist, and therefore ought to be absolutely prohibited.

For Q, consequences count, even in the face of a contrary moral principle. The fact that thousands of people would die if the terrorist were not tortured matters a great deal. If instead, only one person would die (or perhaps, only one person *might* die), Q might be unwilling to authorize torture, even if the person to be tortured is a terrorist. A hybrid cousin of Q, call him P, might, by contrast to Q, even be prepared to torture a terrorist's innocent baby if (but only if) the alternative resulting harm is sufficiently certain and sufficiently catastrophic.

Because one's own philosophical views invariably color one's account of all philosophical positions, fairness requires me to disclose my own approach: I would count myself among the moral hybrids. I care deeply about the consequences of people's actions, but I also consider some actions, under some circumstances, sufficiently wrong to require restraint even when the wrongful means would result in a net gain.

I generally find absolutes unsatisfying, in part because I believe the distinction between action and inaction—a distinction on which rests the ability of the absolutist to claim innocence in the deaths of the untortured terrorist's victims—to be more problematic than many deontologists would acknowledge.⁴⁰ At the same time, I find persuasive the argument that torture warrants and other official recognition of torture's occasional legitimacy are likely to result in even more *unjustifiable* torture than we already have. I find provisionally

⁴⁰ But cf. John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977) (arguing that in situations in which one could save the lives of some subset or another but not all who need assistance, maximizing the number of people saved is not a sound basis for deciding how to proceed).

appealing the notion that anyone who commits an act of torture that she believes is justified be compelled to take the risk of later punishment if she turns out to have been wrong.

B. *A Note About Methodology and Definition*

Before embarking on my examination of how and whether torture is “different,” I wish to explain the methodology that I use as well as the working definition of torture that I employ. Concerning methodology, I develop a series of hypothetical examples on the basis of which I identify moral intuitions that may underlie people’s reactions to the prospect of torture under ethically challenging circumstances. I deploy these examples to highlight particular features of the conduct in question that I believe are worthy of discussion. As experimental sociology has begun to discover, human beings—regardless of culture—tend to share a variety of moral intuitions, a reality that makes conversations about morality a productive enterprise.⁴¹ I find such moral discourse especially helpful because I do not think we can usefully appeal to any universally accepted text or other primary source to identify moral truth. Our moral intuitions, when drawn out and challenged, however, can bring us to a reflective equilibrium.⁴² And this is true even if readers disagree with my reactions to a particular hypothetical example, because, having articulated the competing concerns through a concrete fact pattern, we can have a conversation about what ought to matter in calculating the moral status of interrogational torture. My aim is therefore to identify and distill the content of a conflict rather than to persuade readers of a particular position on the morality of torture.

Cass Sunstein has criticized this methodology, arguing that in consulting their intuitions, people utilize “moral heuristics” that are

⁴¹ See Steven Pinker, *The Moral Instinct*, N.Y. TIMES, Jan. 13, 2008, § 6 (Magazine), at 36 (“When anthropologists like Richard Shweder and Alan Fiske survey moral concerns across the globe, they find that a few themes keep popping up from amid the diversity. People everywhere . . . think it’s bad to harm others and good to help them. They have a sense of fairness They value loyalty to a group They believe that it is right to defer to legitimate authorities And they exalt purity, cleanliness, and sanctity”); see also MARK D. HAUSER, *MORAL MINDS: THE NATURE OF RIGHT AND WRONG* 44 (2006).

⁴² JOHN RAWLS, *A THEORY OF JUSTICE* 48 (1971) (“From the standpoint of moral philosophy, the best account of a person’s sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium. As we have seen, this state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception).”). But see Cass Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1583-84 (2004) (proposing that the dangers of heuristics in factual deliberation could apply as well to reasoning within the moral domain).

prone to error in unfamiliar contexts, in the same way as factual heuristics are.⁴³ “Heuristics” (rules of thumb for quick problem-solving) in the factual domain include the availability heuristic, in which people tend to assume (often incorrectly) that whatever factual explanation most readily comes to mind is correct. Similar to such rules, Sunstein suggests, are moral heuristics—rules of thumb that would, in general, provide the “right” answer to a moral question. Sunstein proposes that moral heuristics can distort our thinking, especially when we deal—as I do in this paper—with exotic and stylized hypothetical examples.⁴⁴ I tend to disagree with this view.

First, I accept that one cannot simply answer a hypothetical question off the top of one’s head and immediately leap to a broad moral conclusion. As with factual inquiries, however, immediate impulses can be modified and adjusted through a process of comparison and identification of principles and relevant distinctions. This process, of formulating “exotic” hypothetical examples and then articulating my own responses and fine-tuning them by reference to other examples, strikes me as very different from the process of blindly following a rule of thumb, as people are prone to do in the factual heuristics context.

Second, some of the specific examples by which Sunstein attempts to demonstrate that moral heuristics malfunction in the world of exotic hypotheticals do not obviously illustrate his point. Notably, he invokes and discusses two well-known thought experiments involving trolleys, the first of which hypothesizes that “a runaway trolley is headed for five people, who will be killed if the trolley continues on its current course. The question is whether you would throw a switch that would move the trolley onto another set of tracks, killing one person rather than five.”⁴⁵ The second contains the same facts, but with one difference: “The only way to save the five is to throw a stranger, now on a footbridge that spans the tracks, into the path of the trolley, killing that stranger but preventing the trolley from reaching the others.”⁴⁶ Sunstein asserts that people’s nearly universal tendency to classify the trolley cases differently, depending on whether one is switching tracks or throwing a person in the way of a train, is obviously misguided, because the same number of lives are lost (1) and the same number are saved (5) in both of these examples.⁴⁷

⁴³ See Sunstein, *supra* note 42.

⁴⁴ See *id.*

⁴⁵ Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 780 (2003) (reviewing HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002)); see also Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (1978).

⁴⁶ Sunstein, *supra* note 45; see also Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395, 1409 (1985).

⁴⁷ See Sunstein, *supra* note 45; Sunstein, *supra* note 42 at 1583-84 (“[T]he underlying
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His conclusion, however, rests on the contested assumption that the only morally relevant dimension of the scenario is the number of lives forfeited and the number saved, rather than considering the possibility that intentionally using a person's live body to stop a train is different from foreseeably causing a person's death by intentionally diverting a train away from a larger number of vulnerable people. This—the purpose/knowledge distinction (or what is also called the intending/foreseeing distinction⁴⁸)—reveals that utilizing a strict utilitarian principle rather than consulting our moral intuitions may well mask important features of morally challenging (and perhaps even more realistic) triage situations.

I now turn to the question of defining torture. The Convention Against Torture and the implementing federal legislation define it as the deliberate infliction of severe pain by or at the behest of a government official.⁴⁹ The first question that arises is whether to include in my own definition the “severity” criterion. I am not committed to a strong version of this criterion, but I do think that trivial pain—of the sort accompanying a pinch by an angry sibling—falls outside of any sensible definition. The precise meaning of torture will be somewhat hazy at the margins, but I wish to eliminate trivial (but deliberate) infliction of pain, such as the act of pinching or slapping, from the definition. I therefore retain the severity criterion, though I certainly reject the views expressed in the Bybee memo about the meaning of “severe pain” and do not mean for anything in this Article to support the conclusion that one must be in the sort of agony that accompanies death before one can be said to have experienced torture.⁵⁰

Another feature of defining torture involves the identity of the actor carrying out the deliberate infliction of pain. International law and domestic law generally define and prohibit torture by state officials but

heuristic misfires in drawing a distinction between the two cleverly devised cases.”).

⁴⁸ See, e.g., David Enoch, *Ends, Means, Side-Effects, and Beyond: A Comment on the Justification of the Use of Force*, 7 THEORETICAL INQ. L. 43, 55-57 (2006); see also David Enoch, *Intending, Foreseeing, and the State*, 13 LEGAL THEORY (forthcoming 2007)).

⁴⁹ U.N. Convention Against Torture, *supra* note 7. Notably, the International Criminal Court (“ICC”) definition of torture differs from the C.A.T. definition in some significant ways. It reads: “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” Rome Statute of the International Criminal Court, art. 7 § 2(e), July 1, 2002, available at <http://www.icc-cpi.int/legaltools/download.php?p=L0IuIEJhc2ljIElDQyBkb2N1bWVudHMvUm9tZSBDdGF0dXRlICGwMS0wNy0yMDAwKShFKS5wZGY=>. Unlike the C.A.T. definition, the ICC definition does not require governmental action of any kind for behavior to qualify as torture. It does, however, require custody or control, which the C.A.T. definition does not. The two therefore overlap, but each encompasses a range of conduct excluded by the other.

⁵⁰ See, e.g., Bybee Memo, *supra* note 29, at 328.

not by private individuals.⁵¹ The law thus treats a “state action” requirement as an essential component of the definition of torture. In this Article, I do not treat state action as a necessary condition of torture. In part, this is because whether or not one is acting in an official capacity is, to some degree, a legal construction rather than a pure question of fact. A torturer is always a human being deliberately inflicting great suffering on another.⁵² When we say in ordinary conversation that a private murderer “tortured” his victim before killing him, for example, we are speaking coherently, though there is no state actor involved.⁵³ And to the extent that one believes official torture is morally warranted in a limited set of circumstances, one is unlikely to argue that a private act of torture under the same circumstances would be unjust. The converse is also true.⁵⁴

The law may, of course, treat public and private torture differently, because a state apparatus that recognizes a place for official torture will have significant institutional consequences. To implement Alan Dershowitz’s “torture warrants” proposal, for example, one would have to acknowledge and even train “repeat players” in the torture endeavor. One could therefore believe that an act of torture—under a limited set of conditions—is just and right, but believe as well that the consequences of institutionalizing torture and creating a class of torturers are too great

⁵¹ See Convention Against Torture, *supra* note 7; The Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(a)(1) (2007). But see ICC definition of torture, *supra* note 49, which includes no state action requirement.

⁵² In this Article, I deal exclusively with the torture of human beings, although it is widely understood that a person can torture an animal as well.

⁵³ See, e.g., *House v. Bell*, 547 U.S. 518, 532 (2006) (discussing, in the context of capital sentencing, the state’s efforts to prove “that the homicide was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind,” an aggravating factor weighing in favor of a death sentence); *Rompilla v. Beard*, 545 U.S. 374, 378 (2005) (noting that the jury in a capital case found, as an aggravating factor, that “the murder was committed by torture”); see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2414 (1976) (defining torture as “the infliction of intense pain . . . to punish or coerce someone”).

⁵⁴ Cf. *Ambos*, *supra* note 27 (discussing the significance of state action in distinguishing between what the law permits and prohibits, on the one hand, and what an individual may or may not be blamed for doing, on the other). Kai Ambos concludes that to put this public/private distinction into effect, he must utilize the conception of “excuse”—so that the individual has acted wrongfully but nonetheless may not be punished. If one takes the view, however, that torture is truly just under the circumstances, then, it seems, one has to say that the act is not “excused” but justified, though it may nonetheless be unlawful.

I wish here to thank my colleague Jens Ohlin for insightfully observing that international law tends to focus on the *ex ante* legality of conduct, while criminal law focuses on the *ex post* treatment of the individuals who engage in that conduct (which includes a sensitivity to the particular circumstances that confronted them). Because of this distinction in perspectives, one might say simultaneously, as the Israeli Supreme Court said, that torture is absolutely prohibited under the law, that no authorization for torture exists, but that an individual tried for an act of torture might nonetheless have recourse to a defense. H.C. 5100/94 Public Committee against Torture in Israel and Others v. The State of Israel, The General Security Services and Other, 53(4) PD 817 (1999), in *TORTURE: A COLLECTION*, *supra* note 1, at 165, 177 [hereinafter Committee against Torture v. Israel].

to countenance.⁵⁵

A final point on the definition of torture is that some might argue there can be no torture without domination. In one sense, domination is necessarily part of what makes an act torture. If one is in a position to inflict severe pain on another person for as long as it takes to motivate an otherwise undesired course of conduct, one must have a degree of power over the other person. If one is utterly powerless over another, it follows that one cannot feasibly torture him or her.

In another sense, however, the notion that torture must include domination—of the sort that a sadist exercises over his prey—is not obviously accurate. If we assume that torture is wrong, then we might well view the torturer as necessarily engaging in the exercise of raw power, but this assumes the conclusion of our inquiry about whether torture can ever be justified. To determine the answer to this question, we must be able to assume that the torturer is not on a “power trip” vis-à-vis the tortured but that his attitude might conceivably be that of someone who seeks a just outcome and means to cause only as much harm as is absolutely necessary to save lives threatened by the tortured party and no more. That is the case of torture about which people debate.

II. HOW “DIFFERENT” IS TORTURE?

This Part takes up the central question of the Article: Is torture truly unique, and if so, why? The first section identifies killing as the act from which torture might be morally distinct. The following sections elaborate several examples that illustrate when torture might be unambiguously justified in true self-defense, when it might instead raise debatable questions about its legitimacy, and when it would be regarded by most theorists as unambiguously wrong. Through these examples, this Part arrives at the conclusion that there are three features of justifiable torture (shared in common with justifiable killing): the status

⁵⁵ I have argued, for example, that even if one is not troubled by the death penalty from the point of view of the condemned and what he deserves—he has committed murder, after all, and will likely die in much less pain than his victim or victims did—one might still recoil at the death penalty because it requires human beings to participate in carrying out deliberate acts of killing unarmed people. See Sherry F. Colb, *What Is, And What Is Not, Wrong With the Death Penalty*, FINDLAW, Nov. 22, 2000, <http://writ.news.findlaw.com/colb/20001122.html>. Both because it effects a change in the torturer and because it affects the public (by exposing the population to such a changed person), one could well favor a ban on official torture even if one views the ticking bomb scenario as one in which torture (by an official or by a private individual) is justifiable. In this Article, however, my main concern is analyzing why, putting aside the impact on the torturer of *being* a torturer, people have such distinctive reactions to torture by comparison to other ills that human beings can and do visit upon one another. For that reason, I do not focus here on the identity of the torturer as a state official.

of the person who will be tortured as a wrongdoer; the utility of torturing the wrongdoer to save innocent others; and the tightness of the link between the person's status as a wrongdoer and the utility of torturing him (rather than someone else) in achieving the life-saving objectives sought.

A. *Pain Versus Death*

Of greatest interest to me in examining the torture debate is *why* there appears to be such broad consensus on the distinct moral status that torture occupies. Like virtually every moral theorist to take a position on this question, I agree that torture is nearly always (if not actually always) wrong. In that, I share the intuition that torture is "different" and requires a moral analysis that is distinct and more demanding in some way. But distinct from what? If *death* is different from *prison*, in other words, what is *torture* different from?

Though seldom the focus of debates over torture, the thing from which torture is "different" is most clearly death.⁵⁶ The various "camps" in the debate over torture do not typically take the position that the prohibition against killing people is absolute.⁵⁷ In moral terms, deontologists and utilitarians alike ordinarily acknowledge a role for justifiable homicide. Those who are not pacifists embrace the legitimacy of killing within the confines of a just war.⁵⁸ Some, such as Immanuel Kant—the consummate deontologist—believe in the rightness and even essentiality of the death penalty.⁵⁹ Many believe that killing a terminally ill person who wants to die is just.⁶⁰ The Supreme

⁵⁶ My concern in this Article regards the questions whether and why torture is normatively distinct from killing. I thank Robert Ferguson for pointing out that regardless of how one answers the normative question, one must recognize that there is surely an epistemological distinction between being tortured and being killed. When we deprive a person of life, we necessarily cannot know—to the same degree as we understand the consequences of torture—what we have taken away. In this sense, the deprivation of life introduces a greater unknown than the infliction of torture. Which way that difference cuts, however, is by no means obvious.

⁵⁷ See Joyce S. Dubensky & Rachel Lavery, *Torture: An Interreligious Debate*, in TORTURE DEBATE, *supra* note 1, at 162, 167 ("Christian traditions have developed concepts of just wars, which recognize limited circumstances in which force may be deemed justified. . . . [M]ost adherents of this theory oppose torture . . .").

⁵⁸ See Jean Bethke Elshtain, *Reflection on the Problem of "Dirty Hands,"* in TORTURE: A COLLECTION, *supra* note 1 at 77, 80 (discussing *jus ad bellum* and *jus ad bello*).

⁵⁹ See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., Cambridge University Press 1991) (1797) ("If, however, he has committed murder he must *die*. Here there is no substitute that will satisfy justice."); see also Louis Pojman, *In Defense of The Death Penalty* 494, reprinted in ETHICS IN PRACTICE 493-502 (Hugh LaFollette ed., 2d ed. 2002) ("When the offender with malice aforethought takes the life of an innocent person, he or she forfeits his or her own right to life.").

⁶⁰ See Brief of Amici Curiae In Support of Respondents, Julian M. Whitaker M.D., Washington v. Glucksberg, 117 S. Ct. 2258 (1996) (Nos. 96-110, 95-1858); Kathryn L. Tucker &

Court has said (and many share the view) that police officers may justifiably kill a dangerous fleeing felon who cannot otherwise be subdued.⁶¹ And least controversial of all is the moral view that killing a person who threatens us (or a third party) with imminent death is justifiable.⁶²

Furthermore, we do not often encounter the position that killing another person should be subject to an absolute *legal* ban, either to minimize unjustifiable homicides or to express a community norm that killing is always wrong.⁶³ One who kills in self-defense need not resign himself to his rightful punishment or throw himself on the mercy of jurors who may or may not be willing to nullify an all-encompassing homicide prohibition. The law is and ought to be clear: if someone threatens us with death or substantial bodily harm and we cannot safely retreat or defuse the threat with non-lethal force, we are justified in killing the person who poses that threat.⁶⁴

Some proponents of a limited right to torture cite our moral and legal willingness to tolerate killing under some circumstances as proof that, *a fortiori*, torture must also be permissible at times.⁶⁵ How, they ask rhetorically, can it be acceptable to kill but not to torture when killing so obviously represents a worse deprivation than torture does?

Though the implied assertion may initially sound persuasive, its implicit "greater-includes-the-lesser" argument is deeply flawed. First,

David J. Burman, *Physician Aid in Dying: A Humane Option, a Constitutionally Protected Choice*, 18 SEATTLE U. L. REV. 495, 504 (1995) ("[F]orced continuation of a life ravaged by pain and suffering for a competent, terminally-ill adult who has a voluntary and informed desire to hasten his or her own death is a cruel and demeaning invasion into basic rights of liberty, privacy, and self-determination."); Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician-Assisted Suicide*, 33 HARV. J. ON LEGIS. 1 (1996) (proposing model legislation for the legalization of assisted suicide).

⁶¹ See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985) (indicating that deadly force directed against a fleeing felon is lawful when but only when there is good reason to believe that the felon will otherwise pose a danger of death or substantial bodily harm to officers or other civilians).

⁶² David Rodin, *War and Self Defense*, 18.1 ETHICS & INT'L AFF., Winter 2004; Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 252 (1994) ("That there are occasions on which it is permissible intentionally to kill another person in self-defense is an axiom in contemporary ethical theory."); David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 356 (1987) ("Self-defense provides a particularly strong and unapologetic defense to killing. . . . a positive good rather than a forgivable lapse.").

⁶³ But see THE MIND OF MAHATMA GANDHI 49 (R.K. Prabhu & U.R. Rao eds., 1945) ("Non-violence is the greatest force at the disposal of mankind. . . . Every murder or other injury, no matter for what cause, committed or inflicted on another is a crime against humanity."); HEINRICH ZIMMER, PHILOSOPHIES OF INDIA 250 (Joseph Campbell ed., 1956) ("The worst offense possible, according to the Jaina view, is the killing or injuring of a living being . . ."); Matthew 5: 39-42 ("But I say unto you, . . . whosoever shall smite thee on thy right cheek, turn to him the other also.").

⁶⁴ See, e.g., MODEL PENAL CODE § 3.04 (1962); see also N.J. STAT. ANN. § 2C:3-4 (1999); TEX. PENAL CODE ANN. § 9.31 (Vernon 2007).

⁶⁵ See e.g., Bagaric & Clark II, *supra* note 17, at 703 ("[I]t is a lesser evil to inflict physical harm on a person than to allow large numbers of people, or even a single person, to die.").

torture is not always “less than” death. Those who support a right to physician assistance in dying, for example, specifically reject the pain/death hierarchy and argue that some people legitimately find their suffering so great that they wish for death and ought to have a legal right to make that wish a reality, with a doctor’s help.⁶⁶ Though the Supreme Court did not recognize a constitutional right to this effect in *Washington v. Glucksberg*, a concurring opinion authored by Justice Souter indicated a readiness to revisit the issue if it turns out that doctors cannot satisfactorily ameliorate terminal patients’ pain with medication.⁶⁷ In such cases, a patient might well have a constitutional right to seek relief from pain in the only manner available—through death.⁶⁸

The Eighth Amendment precedents point in the same direction: we may kill a limited class of the most heinous criminals as punishment for their offenses, but we may not inflict severe pain on them, either instead of, in addition to, or in the process of killing them.⁶⁹ To put the matter crudely, if there is a choice between executing a condemned prisoner at midnight versus tormenting him at midnight and killing him at 1 in the morning, the former option is constitutionally valid, while the latter—though it extends his life by an hour—is a blatant violation of the ban against cruel and unusual punishments. Though killing our fellow human beings is generally impermissible, both morally and legally, it is not always and necessarily the worst thing we can do to them. Deliberately inflicting excruciating pain is often (though not invariably) worse.

Beyond head-to-head comparisons, it is also the case that the circumstances under which torture occurs—and the purposes for which

⁶⁶ See *supra* note 60. Cf. Sherry F. Colb, *Opposition to Abortion and Physician Assistance-In-Dying: The Claim that Choice Can Evolve Into Coercion*, FINDLAW, June 11, 2007, <http://writ.news.findlaw.com/colb/20070611.html>.

⁶⁷ *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring) (indicating that the Court will revisit issue of physician-assistance in dying if palliative care proves inadequate to relieve patients’ pain).

⁶⁸ Alternatively, the importance of alleviating one’s pain could form the basis for a necessity defense in response to criminal charges. Cf. *Gonzales v. Raich*, 545 U.S. 1 (2005) (refusing to enjoin federal enforcement of marijuana prohibitions against a dying woman using marijuana for medical purposes, rejecting the claim of a constitutional right to use marijuana, but suggesting that appellant could likely assert a common law necessity defense when facing actual prosecution for her conduct).

⁶⁹ See *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (“[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”); *Wilkerson v. Utah*, 99 U.S. 130 (1878) (“[P]unishments of torture . . . are forbidden by [the Eighth] amendment to the Constitution”); see also *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994) (articulating the duty of prison officials under the Eighth Amendment to provide prisoners with humane conditions of confinement, food, shelter, medical care, and safety); KANT, *supra* note 59, at 142 (“[D]eath judicially carried out] must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable.”).

it might conceivably be deployed—sometimes differ fundamentally from those that occasion the deliberate use of deadly force. Given this disparity in circumstances and goals, comparing torture with killing might be a bit like comparing the proverbial apples and oranges. Even, in other words, if death were objectively “worse” than torture, it could be that human beings sometimes confront circumstances in which only killing will effectively and justifiably address the threat in question. And it might be, by contrast, that the circumstances under which torture but *not* killing would accomplish our objectives are of the sort that would justify neither torture nor killing. I will discuss the “how different are apples from oranges” question later, but for now, let us compare apples with apples.

B. *Torture in Uncomplicated Self-Defense*

Debates abound regarding what acts “count” as torture.⁷⁰ However, there are some things that clearly qualify. If one person bites through another person’s flesh until he crushes bones, for example, that would seem to fall unambiguously into the category of torture. Indeed, many torture methods might be conceptualized as modified forms of biting. To ensure that I am not mistaken for a sadist for having mentioned a particular method,⁷¹ I will shortly clarify the reason for my selection.

To determine why the international community, our law, and many theorists reject torture categorically while they do not do the same for death, we must hypothesize a case in which killing would be permissible and ask whether—assuming that torture accomplished the same objectives as killing would have done—the prohibition on torture would still apply. Those who defend limited uses of torture routinely invoke “self-defense” analogies to suggest that the two situations are essentially equivalent.⁷² But the reality is that, most of the time, the

⁷⁰ See Parry, *supra* note 10, at 146-49 (discussing the important definitional distinction between “torture,” on the one hand, and “cruel, inhuman or degrading treatment,” on the other); see Bybee Memo, *supra* note 29, at 328 (contending that “torture is not the mere infliction of pain or suffering” and that “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result”); see also Levin Memo, *supra* note 29 (discrediting definitional argument in Bybee Memo); see Waldron, *supra* note 4 (strongly criticizing the entire definitional enterprise when it comes to torture, because such precise line-drawing suggests inappropriately the legitimacy of going up to the line (in the way that a speed limit does)).

⁷¹ See Richard Posner, *supra* note 31, at 28 (“But it is typical of Dershowitz’s lack of restraint that he should think it appropriate to reveal to his readers . . . his preferred form of ‘nonlethal torture.’”).

⁷² See Moore, *supra* note 27, at 320-25; Bybee Memo, *supra* note 29, at 355 (“[W]e believe

circumstances that call for justifiable homicide are at least somewhat distinct from those that, by some lights, call for torture. The following hypothetical example should help bridge the gap and answer the first basic question in assessing why torture might be different: whether deliberately inflicting severe pain is truly off-limits in circumstances in which it would actually serve the *exact same* purpose as killing in self-defense.

1. The Curious Case of Intruding Strangler and Suburban Prey

Suburban Prey is a single, female homeowner who lives in a quiet suburb. Prey's children are grown, and she is sitting in her living room, perusing the want ads for opportunities to re-enter the workforce. Absorbed in her task, she does not notice Intruding Strangler sneaking into her home through an open window. Strangler is a paid assassin who has been instructed by his current client to do away with Prey. Strangler approaches Prey and begins to strangle her with his hands, as per his *modus operandi*.

Prey has the right to kill Strangler in self-defense, but she does not have access to a weapon. She can, however, reach Strangler's hand with her teeth, so, with the limited strength that she has, she bites hard into his fingers, breaking the skin. Strangler screams in pain but continues to strangle Prey, because he is committed to finishing what he has started, a key to maintaining a successful business as an assassin. Prey bites harder and begins to fracture Strangler's bones. Strangler screams again in pain, yelling "Stop biting me!" Prey does not stop, however, and Strangler—unable to tolerate the pain any longer—lets go, at which point Prey stops biting him, runs out of her house, and successfully escapes from her would-be killer.

Prey's actions provide an example of torture in self-defense. Indeed, the fact pattern presents, in many respects, a paradigm case of self-defense. Strangler is in the process of actively (and unjustifiably) attempting to kill Prey when, by her actions, Prey intervenes. Absent this intervention, Prey would imminently die. Torture is therefore "necessary" to her survival, with no less restrictive alternative available. Strangler is a wrongdoer for having brought into being the "tragic choice" between torturing and dying and can accordingly be said to "deserve" the harm he suffers (which is proportional to the suffering he is causing). And Strangler can surrender at any time (by removing his hands from Prey's throat) to terminate the harm that he suffers. Like

that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another.").

killing in self-defense, the ultimate purpose of Prey's deliberate infliction of pain on Strangler is to disable him from continuing his life-threatening assault on her.

What distinguishes Prey's case from killing in self-defense is one and only one thing: rather than attempt to kill Strangler to disable his murderous assault, Prey attempts instead to cause him excruciating pain, to the same end. In other words, the means are torture—the deliberate infliction of severe pain rather than the intentional infliction of death—while the ends, in both cases, are the same: terminating the strangulation. If Prey's attempts to torture her assailant had failed—if her biting him were not as painful as she had hoped or if he could tolerate more pain (and was more committed to her murder) than she had anticipated—then she would have failed, much as any torturer who errs about her victim's pain threshold (or any shooter in self-defense who misses his target) might fail.

In our example, however, as might occur in a case of interrogational torture, an escalation in pain ultimately “breaks” the target's will. The pain that Strangler experiences is therefore not “incidental” to some other objective (as, for example, the suffering of victims in a bombing operation might be—the goal there is to kill them or destroy munitions, though the victims' suffering is often as great as that inflicted in the course of torture). Prey's *goal* is to cause Strangler to suffer as a means of forcing him to let go of her (and thus to permit her to live).

There is no question, for anyone who believes in a right to lethal self-defense, that Prey acts justifiably in biting Strangler until he cannot take it anymore. Even an absolute opponent of interrogational torture under any set of circumstances would have to agree that Prey has every right to defend her life by biting Strangler. Furthermore, it is difficult to imagine anyone suggesting—as many do, in the case of interrogational torture—that the law should officially prohibit Prey's actions and leave it to executive clemency, jury nullification, or other expressions of grace to spare her, as appropriate.⁷³ Prey's behavior is obviously warranted and the embrace of that normative position ought to be—and is—reflected in the law as written.⁷⁴ Her actions should be and are, in

⁷³ See, e.g., Committee against Torture v. Israel, *supra* note 54, at 179 (explaining that the law does not authorize torture but that a necessity defense might nonetheless be available to some practitioners of it); Gross, *supra* note 26, at 244 (“My proposal calls for maintaining an absolute ban on torture while, at the same time, recognizing the possibility (but not certainty) of state agents acting extralegally and seeking ex post ratification of their conduct.”).

⁷⁴ E.g., N.Y. PENAL LAW § 35.15 (McKinney 2007) (“A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless: a) The actor reasonably believes that such

other words, authorized in advance by the law of self-defense.

Accordingly, whatever difference there is between the harms deliberately inflicted by torture and by death, respectively, does not limit a victim's (or, presumably, a third party's) options in the face of an imminent and active attempt on her life by the proposed target of the torture or death. Circumstances that would justify *killing* an aggressor to disable him from imminent, violent action would also and uncontroversially justify *torturing* the aggressor instead. (In fact, one could conceivably characterize Prey's actions as a less extreme measure than killing Strangler would have been, though I am not committed to this proposition and do not rely on it here.)

What makes interrogational torture "different" from killing and accordingly subjects it to international legal condemnation and wide-scale absolutist opposition is not something inherent in the distinction between deliberately causing excruciating pain, on the one hand, and deliberately killing, on the other. The distinction—if there is one—must therefore lie in the circumstances that give rise to the decision to inflict torture (as opposed to those that give rise to the decision to kill). When the circumstances are truly identical, the absolute opposition to torture disappears.

C. *The Defenseless Target*

One account of why interrogational torture is uniquely objectionable relies on the status of the person who is interrogated. Unlike Intruding Strangler, the assassin of our earlier example, a person to be subject to interrogational torture is relatively powerless in the face of his torturers. Consider, by contrast, the soldier in the midst of a battle. While engaged in a "fair fight," no one is in a practical position to present her opponent with the option of either revealing information or undergoing excruciating pain. Such, however, is the position of the powerless captive. And as Henry Shue and Seth Kreimer both suggest, there is something deeply immoral—by most lights—about kicking someone when he is down or, as is specifically the case with a subdued captive, attacking him when there is nothing he can do to defend himself against the attack.⁷⁵ The question that invariably arises, however, is whether this account of the prisoner undergoing

other person is using or about to use deadly physical force.").

⁷⁵ See Shue, *supra* note 35, at 51 ("The torturer inflicts pain and damage upon another person who, by virtue of now being within his or her power, is no longer a threat and is entirely at the torturer's mercy."); Seth F. Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints in the War on Terror*, 6 U. PA. J. CONST. L. 278, 298 (2003) ("[Torture] inflicts agony on the helpless . . .").

interrogational torture is faithful to the facts.

To answer this question, Shue usefully divides captured prisoners withholding crucial information—those whom proponents of a limited authority to torture might identify as potentially legitimate targets—into three categories: the innocent bystander, the ready collaborator, and the dedicated enemy.⁷⁶

In this typology, the first captive, the innocent bystander, has important information but is not otherwise associated with the project that her captors aim to thwart. Such a person, Shue suggests, is not defenseless in the face of her captors: she need only convey her informational quarry—in the secrecy of which she holds no stake—and she can avoid the threatened pain altogether.

The ready collaborator, a second captive, is nominally a member of the enemy's army, but she is nonetheless eager to save herself by answering her captors' questions and is untroubled by the betrayal that such a disclosure might represent. Like the innocent captive, then, she too is not, in theory, defenseless, because she can prevent the threatened pain by disclosing information that she has no qualms about revealing.

Shue posits a third captive who is different from the first two: the dedicated enemy. This captive possesses the information that his captors demand, but he—unlike the others—is committed to keeping the information secret. He is a true believer in the cause for which he is fighting, and he is prepared to accept death rather than give up what he knows about the “ticking bomb” or whatever other catastrophe his captors hope to avert. To extract the information from him, then, will require torture—or the breaking of his will.⁷⁷ To torture a captive under these circumstances is illegitimate, argues Shue, because the torturer confronts the captive with an unacceptable choice—he must either betray his deeply held beliefs or suffer horrible torments. That, Shue argues, is truly no choice at all. Like the choices presented to a victim of religious torture—asked to suffer or forsake his God—such forced choices are wrong, no matter how worthy the objectives they are meant to serve.

Though Shue presents a compelling account of what the various potential torture victims might experience, his argument about the “dedicated enemy” captive does not adequately distinguish such a person from the dedicated enemy in the battlefield. Under the laws of war, a soldier may continue shooting at or otherwise attempting to kill an enemy soldier unless and until the enemy surrenders, at which point the latter becomes a prisoner of war, entitled both to survive and to be

⁷⁶ Shue, *supra* note 35, at 54.

⁷⁷ See Sullivan, *supra* note 19, at 20 (“What torture does is use these involuntary, self-protective, self-defining resources of human beings against the integrity of the human being himself. It takes what is most involuntary in a person and uses it to break that person’s will.”).

treated humanely.⁷⁸

What makes the soldier pinned down in the field something other than “defenseless” in the face of superior enemy force, then, is the ability to surrender and thereby put a stop to the attack that might otherwise, lawfully, kill him.⁷⁹ For a dedicated enemy soldier, however, surrender could signify the sort of humiliation over which he might well choose death: surrender betrays the cause, strengthens the will of the enemy, and demoralizes one’s allies. From the perspective of some soldiers, then, the surrender option is as unacceptable as the revelation of a “ticking bomb” location would be from the perspective of a dedicated enemy captive who wants that bomb to explode and kill civilians, as planned.

To be sure, the soldier is distinct from the captive in one important respect: the former is armed. Nonetheless, the captive resembles the soldier in that both are threatened with violence that they have the power to stop in one and only one way: by surrendering something valuable (weapons or information), the surrender of which their loyalties may resist or preclude.

As with the unenthusiastic soldier at war, then, the main distinction between the “innocent bystander” and “ready collaborator” captives, on the one hand, and the “dedicated enemy,” on the other, is that what the captors demand is not experienced as a terribly burdensome sacrifice for the first two but is felt to be overwhelmingly so for the third, to such a degree that he might try as long as he can to tolerate the excruciating alternative. When he cannot do so, moreover, there is ignominy in surrendering, which Shue’s approach insightfully acknowledges. Like dedicated enemy captives, however, dedicated opponents in the battlefield are *also* more likely than their less committed comrades to fight to the death. This does not make it wrong for enemy soldiers to fire on them rather than be killed; it makes it all the more pressing and legitimate that they do. These committed fighters pose a graver threat than the other two categories of soldier, and—at least in the battlefield—greater force may accordingly be justified.

One could, at this point, be tempted to return to the distinction between torture and death, and suggest that while many people might be capable of giving their lives rather than betraying their cause, the torments of severe physical pain render resistance impossible for

⁷⁸ See Parry, *supra* note 10, at 149 (“The Geneva Conventions ban the use of ‘torture [or] any other form of coercion’—including threats, insults, or ‘unpleasant or disadvantageous treatment of any kind’—on prisoners of war. A similar protection extends to civilians during hostilities or occupations.”) (quoting Convention Relative to the Treatment of Prisoners of War, August 12, 1949, arts. 3, 13, 17, available at www.hri.ca/uninfo/treaties/92.shtml).

⁷⁹ The soldier also, of course, has the ability to fire back at the enemy, but surrender might become the only real option once a soldier perceives himself as sufficiently outnumbered by his opponents to be effectively committing suicide by continuing to fight.

virtually everyone. Even Khalid Sheikh Mohammed reportedly “begg[ed] to confess” after two and a half minutes of water-boarding, a sustained resistance that apparently garnered him admiration among his interrogators.⁸⁰

The argument that death is easier on its victims than torture, however, is no answer. We have seen that in true self-defense contexts, torture—like killing—is permissible. However, just as interrogational torture is not exactly the same as self-defense, neither is the battlefield exchange of gunfire exactly the same as self-defense, particularly when the shooters have *launched* the attack in which they are now killing their opponents (pending surrender).⁸¹ The overarching goal of force in the battlefield is victory, not self-preservation. If opponents surrender, they can, in theory, make the other side’s victory bloodless. But if they do not, the fighting continues until death, capture or eventual surrender. If one’s opponents are committed to the battle, then they will surrender only—if at all—when they view resistance as futile or decide that they would prefer to live as prisoners of war than to die on the battlefield.⁸²

The reality that torture may be a more effective means of subduing an enemy’s resistance than the threat of death, moreover, cannot, in and of itself, render torture impermissible.⁸³ For some dedicated soldiers, the fear of imminent death may not be powerful enough to motivate surrender, while for others, it might be. It would hardly seem coherent, however, to claim that shooting at the enemy is moral when but only

⁸⁰ See Sullivan, *supra* note 19, at 20. (describing waterboarding and its impact: “‘The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.’ . . . ‘CIA officers who subjected themselves to the waterboarding technique lasted an average of 14 seconds before caving in. They said Al Qaeda’s toughest prisoner, Khalid Sheikh Mohammed, won the admiration of interrogators when he was able to last between two and two and a half minutes before begging to confess.’”) (quoting an ABC news report).

⁸¹ One might therefore conceive of both battlefield aggression and interrogational torture as contexts in which a justification that only imperfectly resembles self-defense presents itself. Cf. Franklin v. State, 18 S.W. 468, 473 (Tex. Ct. App. 1892) (“A perfect right of self-defense can only obtain and prevail where the party acted from necessity, and is wholly free from wrong or blame in occasioning or producing the necessity which required his action, viewed from his standpoint . . .”).

⁸² One reason for signing onto and abiding by international agreements prohibiting torture is that one’s enemies are more likely to surrender if doing so does not expose a captive to brutality. See, e.g., Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to “A New Kind of Warfare”*, in TORTURE DEBATE, *supra* note 1, at 136, 143-44 (“By treating the foreign military units with dignity accorded by the laws of armed conflict, it was easier to bring them to surrender and thus bring hostilities to an end. This approach was followed with some success, from the German perspective, in French North Africa.”). This, however, is a pragmatic argument for enacting laws against torture rather than a moral argument for why torture is always and necessarily wrong.

⁸³ Indeed, the threat of death itself (even if it will never be carried out) can qualify as a form of mental torture. Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(a)(4)(iii) (2008).

when it does nothing to deter the enemy's fire. The efficacy of the threat of death in leading ultimately to the surrender of the enemy, far from delegitimizing the entire enterprise of war, is arguably its very essence.

This is not to say, of course, that the purpose of killing in war (or, for that matter, the purpose of torture) is irrelevant to its morality. One may use deadly force in self-defense, for example, but not in the defense of property.⁸⁴ And a nation's leader may send soldiers overseas to shoot at other soldiers in a battle to fight injustice but not—in modern times—to expand territorial holdings by appropriating another nation's land.⁸⁵ In the interrogational torture context, even if we assume that defusing a ticking bomb is a legitimate objective that justifies torture, it would not follow that a captor could properly demand a confession to serve other, less compelling ends, such as prosecution (not to mention religious conversion, sadism, or simple domination).⁸⁶

Once we accept, however, that the killing of even dedicated enemy soldiers in war is sometimes justifiable but must nonetheless cease when the soldiers surrender, we have implicitly rejected Shue's putative distinction between using interrogational torture against those who care strongly about allowing the ticking bomb to explode and using it against those who do not. If employing violence to defuse the ticking bomb is morally permissible when a "ready collaborator" holds the necessary information, then using violence against one's non-surrendering "dedicated enemy" to defuse the bomb cannot be considered wrong simply because the enemy would prefer almost any other fate to that of surrender. The distinction between the relative defenselessness of the

⁸⁴ See, e.g., FLA. STAT. § 776.031 (2007) ("[T]he person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony."); 720 ILL. COMP. STAT. 5/7-3(a) (2007) (containing similar statutory provision); ME. REV. STAT. 17-A, § 105 (2007) (containing similar statutory provision); see also MODEL PENAL CODE § 3.06(d) (1962).

⁸⁵ See Benjamin B. Ferencz, *The United Nations Consensus Definition Of Aggression: Sieve or Substance* (Oct. 1995), <http://www.benferencz.org/arts/13.html> (discussing Special Committee on the question of defining aggression, 23 UN GAOR, 6th Comm., UN Doc. A/7185/Rev.11 (1968); 24 UN GAOR, 6th Comm., UN Doc. A/7620 (1969); 25 UN GAOR, 6th Comm., UN Doc. A/8090 (1970); 26 UN GAOR, 6th Comm., UN Doc. A/8419 (1971); 27 UN GAOR, 6th Comm., UN Doc. A/8719 (1972); 28 UN GAOR, 6th Comm., UN Doc. A/9019 (1973); and 29 UN GAOR, 6th Comm., UN Doc. A/9619 (1974)); see also MICHAEL WALZER, *JUST AND UNJUST WARS* 111 (2d ed. 1992) ("Wars can only be fought, then, if some 'universal moral principle' requires it: the preservation of peace, the survival of democracy, and so on.").

⁸⁶ David Luban has identified these as purposes frequently (if not always officially) expressed in the act of torture. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *TORTURE DEBATE*, *supra* note 1, at 35, 37. ("The widespread, perhaps universal, presence of sadistic fantasies, more or less deeply repressed, may help explain what happens in actual torturers . . ."); Krauthammer, *supra* note 18, at 24 (proposing exceptions to a ban against torture for "(1) the ticking time bomb and (2) the slower-fuse high-level terrorist (such as KSM)"); Bagaric & Clarke II, *supra* note 17, at 710 ("A bright line can be drawn between using torture as a last resort to save innocent lives, and using torture as an act of suppression, domination, or cruelty.").

dedicated enemy soldier as compared to the willing collaborator thus cannot perform the work of demonstrating why the use of interrogational torture against a captive dedicated enemy soldier is necessarily immoral.⁸⁷ Indeed, if the hypothetical bomb-setter can avoid torture by revealing information that is in his possession, he is necessarily *not* defenseless (in that he can do something to avoid the pain), an insight that Shue surfaces quite well but which he then unconvincingly rejects in the case of the dedicated terrorist. All that the knowledgeable bomb-setter must do is tell his captor where the bomb is or where the suicide bombers planning to detonate themselves are located (or otherwise how to prevent the looming tragedy). Like the soldier in the field who must surrender or be killed, the captive, knowledgeable terrorist who is threatened with torture can surrender what he has (information) and thus avoid a more terrible fate. To be defenseless is to have no acceptable alternative, and if demanding life-saving information is itself legitimate, then—no matter how distasteful it is for the target to reveal it—compelling the revelation of that information through a threat of torture or through torture itself might conceivably be legitimate as well.

D. *Is Interrogational Torture Ever Justified?*

In evaluating the morality of interrogational torture as an absolute matter, the question we ask is whether there could in theory be a case—unlike most or even virtually all other cases—where the person who tortures another for life-saving information is behaving no differently (as a moral matter) from the person who tortures another to disable him from actively committing a murder, as Suburban Prey does in defending herself by torturing Intruding Strangler. As there is likely to be near-universal agreement by deontologists and utilitarians alike, in other words, on the morality and justice of Suburban Prey's actions toward Intruding Strangler, we might ask whether a morally equivalent case of interrogational torture is conceivable and, if not, why not. If a torturer *knows* that her captive is aware of the location of a ticking bomb (but knows nothing more than that), is it justifiable (in the way that self-defense is justifiable) for her to torture the captive so long as he refuses to reveal the location of the bomb? Why or why not?

Consider an example that will sound, in many respects, like self-defense. Indeed, it is a variant on an example proposed to me *as* self-defense by various people, although it will become clear shortly that it

⁸⁷ It would also be perverse to conclude, as Shue's analysis does, that torture is least justified against the *most* culpable actors.

is not technically a case of self-defense. This example involves Oxygen Robber and Asthmatic Homeowner. Like Intruding Strangler, Oxygen Robber breaks into a home with the goal of killing its inhabitant—in this case, Asthmatic Homeowner. Unlike Strangler, however, Robber is not very strong and will not be able to subdue Homeowner physically. Instead, Robber uses stealth. She knows that Homeowner requires an inhaler whenever exposed to smoke, so she carefully slips the life-saving inhaler out of Homeowner's pants pocket and hides it behind Homeowner's refrigerator, without Homeowner noticing. Robber then lights a cigarette.

At this point, Homeowner notices Robber and yells "What are you doing? Put that cigarette out!" Robber puts out the cigarette and watches Homeowner begin wheezing and growing increasingly short of breath as the smoke enters his lungs. Homeowner reaches into his pockets and begins panicking when he notices that the inhaler is missing. He turns accusingly to Robber and yells, "What have you done with it?"

Robber smiles in response and says, "I'm not telling, but don't expect to find it any time soon." Homeowner knows that he has only about one minute left before he will be completely unable to breathe or speak. He grabs a lighter, flicks it on, takes hold of Robber's arm, and brings the flame to her hand. Robber screams and struggles but cannot wrest her hand away from Homeowner.

"Please stop!!!" yells Robber. "Tell me where my inhaler is, and I'll stop," gasps Homeowner. "Behind the refrigerator!" screams Robber, after which Homeowner pulls her to the designated area, sees the inhaler, and stops burning Robber's hand, greedily reaching for his inhaler and saving his own life.

Is this self-defense by Asthmatic Homeowner? No. Self-defense involves disabling an ongoing or imminent attack. Here, the attack—consisting of exposure to smoke and concealment of the inhaler—has already occurred. The only thing left to the attack is for the consequences of the attacker's actions to come to fruition. Disabling or even killing the attacker will therefore do nothing to save the victim's life: the victim needs action, not inaction; specifically, he needs information that only the attacker knows. If the attacker were to leave the house or otherwise become inaccessible, the victim would be doomed. As in the case of interrogational torture and unlike in the case of self-defense, then, the victim *needs* the assailant or, at least, someone who knows what the assailant knows. Like in the case of a poisonous snake who has already bitten her prey, it is too late to *stop* Oxygen Robber and, accordingly, too late for self-defense. By burning Oxygen Robber, Asthmatic Homeowner has thus engaged in interrogational torture.

Does that make Asthmatic Homeowner's conduct wrong? It does not necessarily "feel" that different from Intruding Strangler's self-defense case. After all, the target of the torture is in both cases a wrongdoer who has acted to kill the soon-to-be torturer. The intended homicide victim, in both cases, is torturing in the service of saving her or his own life from the wrongdoer. And in each case, the failure to torture will certainly lead to the death of the intended homicide victim.

To some people, it would seem crazy to say that Homeowner's actions were unjustified. How could the justifiability of torturing an assailant turn on whether the assailant is *in the process of killing* the would-be torturer—as in the case of Intruding Strangler and Suburban Prey—and the goal of the torture is to disable the assailant, or whether the torturer's assailant has instead *already completed the actions necessary to cause the would-be torturer's death*—as in the case of Oxygen Robber and Asthmatic Homeowner—and the goal of the torture is to compel the assailant actively to prevent the consequences of her conduct from coming to pass?

1. Wrongdoing

One potential distinction between acting in self-defense and using interrogational torture lies in the relative likelihood of harming an actual wrongdoer in each case. While true self-defense necessarily targets a wrongdoer, interrogational torture need not do so.

As we know from just about every existing analysis of interrogational torture and its morality, we must confront, among other questions, how to deal with the "innocent" captive who knows life-saving information but refuses to disclose it, for whatever reason.⁸⁸ By "innocent," I mean that he has in no way set in motion the life-threatening events against which torture is to be deployed. Unlike Intruding Strangler, for example, he is not doing (nor has he done) anything to hurt anyone. His complicity in the death of innocents is accordingly entirely passive, the sort of complicity we ordinarily call an "omission" in the act/omission dichotomy or the refusal to become a "Good Samaritan."

Take the case of Bomb Admirer. Admirer's childhood friend Explosive Sender has arranged for a disciple, Dynamite Holder, to detonate herself in a heavily populated skyscraper, thereby causing maximum damage and glorifying the "Secular Humanists," a terrorist sect of which Sender is the leader and Holder a member. Due to an

⁸⁸ See, e.g., Moore, *supra* note 27, at 323-24 (discussing the moral implications of torturing a terrorist who knows life-saving information versus torturing an uninvolved person who happens to know the same life-saving information).

email interception, the police learn that Sender has confided in his friend Admirer the address of the location where Holder will perform her martyrdom mission. The email contains a time of detonation but not an actual location. It says that "I told my trusted friend Bomb Admirer where the bomb will explode, because I love him like a brother and can keep nothing from him. This will all happen in four hours at the location on which Holder and I agreed." The police cannot locate either Sender or Holder, though they make every effort to do so and to increase security measures surrounding all high-rise buildings in the city. The clock is ticking.

The police immediately arrest Bomb Admirer, who is sitting in his living room at the time, watching the television program "24." The agents ask Admirer whether he knows about the terrorist plot. Admirer acknowledges that he does but refuses to tell them where the targeted building is. Though he is not himself a member of the Secular Humanists, he cares deeply for Explosive Sender and does not want to frustrate his plans for glorifying an organization whose tenets are quite appealing to Admirer. The agents take Admirer into custody as a material witness.

With Admirer shackled in an interrogation room, only one hour left before the known moment of detonation, and no leads on the whereabouts of Dynamite Holder or Explosive Sender, the police bring out the waterboard. "I am afraid of drowning," yells Admirer. "I have done nothing wrong. Please don't hurt me!" he pleads. The agents ignore Admirer's pleas and begin the waterboarding procedure.⁸⁹ After five seconds, Admirer waves his arms and tries to scream, "Okay! I'll tell you! Please let me tell you!" The agents release him from the device, and he tells them the exact location where Dynamite Holder will detonate herself at the appointed time—a building where she is currently hiding in a broom closet on the second floor. The police visit the location, find Holder, and defuse the bomb before it can explode.

In this example, Bomb Admirer is not entirely defenseless. He has the information that the police want, and the police legitimately seek to obtain that information. If Admirer surrenders, he can avoid being tortured.⁹⁰ He does not, however, want to surrender. He believes in the cause for which Holder and Sender work. It is therefore only when tortured that Admirer submits to the demands of the police and reveals Holder's whereabouts. He in that sense resembles Shue's "dedicated

⁸⁹ See Sullivan, *supra* note 19, at 20.

⁹⁰ Not everyone agrees that waterboarding qualifies as torture. In a January 29, 2008 letter to the Senate Judiciary Committee, for example, Attorney General Michael B. Mukasey refused to call the technique unambiguously illegal, stating, "There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question." Phillip Shenon, *Mukasey Offers View on Waterboarding*, N.Y. TIMES, January 30, 2008, at A15.

enemy.”

Yet Bomb Admirer, unlike an *enemy soldier* or a member of a terrorist group, is not a causal agent in the events that unfold: he has neither set in motion nor carried out any part of the suicide bombing. He is not, in other words, the person from whom the threat of harm radiates. Unlike Intruding Strangler, who himself tried to kill Suburban Prey, or Oxygen Robber, who tried to do the same to Asthmatic Homeowner, Admirer did not conceive of the idea of a suicide bombing, did not send anyone to carry it out, and did not agree to do anything to facilitate its execution. Admirer chose to keep the plot a secret, even when threatened, because he felt a kinship with the leader of the group carrying it out. Is it morally permissible for the police to torture someone it knows is an innocent person? It is noteworthy that such an example simply would not occur in a self-defense scenario. An unjustified attacker is necessarily the party engaged in wrongdoing.⁹¹ He is the aggressor, and accordingly, killing or torturing him is acceptable (as in the case of Intruding Strangler). But is Bomb Admirer really so innocent?

⁹¹ In referring to a person “engaged in wrongdoing,” I mean the agent from whom the aggression and threat of harm project. It is possible for an aggressor to be insane or otherwise not criminally responsible for his actions, but that does not diminish the victim’s justifiable right of self-defense. Even in the case of the insane attacker, in other words, we attribute the threat (and thus a kind of functional culpability) to the person who attacks, and we accordingly allow self-defensive lethal force to be directed against him. See, e.g., MODEL PENAL CODE and Commentaries, Comment to § 3.11, at 159 (Proposed Official Draft 1962) (“The reason for legitimating protective force extends to cases where the force it is employed against is neither criminal nor actionable—so long as it is not affirmatively privileged.”); Heather R. Skinazi, *Not Just a “Conjured Afterthought”: Using Duress as a Defense for Battered Women Who “Fail to Protect,”* 85 CAL. L. REV. 993, 1021-22 (1997) (“[S]elf-defense can also be invoked against innocent aggressors. By innocent aggressors, I mean insane, incompetent or mistaken aggressors. . . . [I]t also permits killing an innocent threat in self-defense.”); see generally Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177 (1987); George Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 855-75 (1978).

In *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, which appears in the July 1973 issue of the Israel Law Review, 8 ISR. L. REV. 367, as well as in Chapter 9 of *STUDIES IN COMPARATIVE CRIMINAL LAW* (Edward M. Wise & G.O. Mueller eds., 1975), George Fletcher articulates the problem of the psychotic aggressor – the person who poses a threat of death or serious bodily harm to another person but is nonetheless not criminally responsible for that threat. See also George P. Fletcher & Luis Chiesa, *Self-Defense and the Psychotic Aggressor*, in *CRIMINAL LAW CONVERSATIONS* (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157614; and my comment in response, *Justifying Homicide Against Innocent Aggressors Without Denying Their Innocence*, in *CRIMINAL LAW CONVERSATIONS* (2008) (draft with author). Because I share the view that deadly force (or torture) is justifiable in self-defense against a psychotic aggressor, a view explicit in U.S. law of self-defense, see *supra*, I refer to people whose imminent conduct poses a threat of unjustifiable death or serious bodily harm as “wrongdoers,” regardless of personal culpability.

a. Actually Innocent?

Some commentators argue that people like Bomb Admirer are *not* in fact innocent. Michael Moore, for example, maintains that because it would be trivially easy for a captive like Bomb Admirer to disclose what he knows to his captors, he is not that different from Explosive Sender and Dynamite Holder, the people who conspire and carry out the planning and ultimate detonation of the ticking bomb.⁹² Unlike the usual “Bad Samaritan” who chooses not to rescue someone in trouble, Bomb Admirer finds himself in a situation in which nothing could be simpler than revealing what he knows. Failing, under those circumstances, to do so is, on this theory, tantamount to active murder.⁹³

As Miriam Gur-Arye notes in response to Moore’s argument, however, the law does not treat “Bad Samaritans” in such circumstances as remotely the equivalent of murderers themselves.⁹⁴ Even where there are “Good Samaritan” (mandatory rescue) laws on the books,⁹⁵ failure to aid typically constitutes a misdemeanor, at most, and accordingly carries a relatively light sentence.⁹⁶ The fact that a “Bad Samaritan” could easily come to a victim’s aid, moreover, is not unique to Michael Moore’s innocent captive whose knowledge could defuse a ticking bomb. It is instead a common prerequisite to the application of existing Good Samaritan laws.⁹⁷ Judged by our positive law, it therefore appears that the moral status of Bomb Admirer is very different from that of Explosive Sender. On most accounts of

⁹² See Moore, *supra* note 27, at 325.

⁹³ *Id.*

⁹⁴ See Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogation?*, in TORTURE: A COLLECTION, *supra* note 1, at 183, 192-95.

⁹⁵ See, e.g., CAL. BUS. & PROF. CODE § 2395 (2003); MINN. STAT. § 604A.01 (2006); WIS. STAT. § 940.34 (2006); Ontario Good Samaritan Act, S.O. 2001, c. 2; THE FRENCH PENAL CODE art. 63, in GERHARD O.W. MUELLER, THE AMERICAN SERIES OF FOREIGN PENAL CODES (Gerhard O.W. Mueller & Jean F. Moreau trans., 1960); Criminal Code Act 155 (N. Terr. Austl.); VT. STAT. ANN. tit. 12, § 519 (2007).

⁹⁶ See, e.g., MASS. GEN. LAWS ch. 268 § 40 (providing as punishment for violation of a Good Samaritan law “a fine of not less than five hundred nor more than two thousand and five hundred dollars.”); R.I. GEN. LAWS § 11-1-5.1 (2007) (“Any person who violates the provisions of this section shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000).”); MINN. STAT. § 604A.01 (2006) (“A person who violates this subdivision is guilty of a petty misdemeanor.”); HAW. REV. STAT. § 663-1.6 (2007) (“Any person who violates this subsection is guilty of a petty misdemeanor.”).

⁹⁷ See MASS. GEN. LAWS ch. 268 § 40 (2007) (“[T]o the extent that said person can do so without danger or peril to himself or others”); see also R.I. GEN. LAWS § 11-1-5.1 (2007) (“[T]o the extent that the person can do so without danger of peril to the person or others”); MINN. STAT. § 604A.01 (2006) (stating a similar statutory requirement); WIS. STAT. § 940.34 (d) (2006) (“A person need not comply with this subsection if any of the following apply: . . . Compliance would place him or her in danger.”).

permissible interrogational torture, the torment of Bomb Admirer will likewise prove far more difficult to justify than that of Explosive Sender.

By contrast to Moore (who would permit the torture of Bomb Admirer, the Bad Samaritan), Gur-Arye argues that only a true wrongdoer, who has set in motion a ticking bomb—Explosive Sender, in our example—may justifiably be tortured for information he holds and the disclosure of which will prevent the death of many.⁹⁸ Gur-Arye suggests that only when people hold a duty of care toward another (a duty that may result from a special relationship or from having caused the dangerous situation in the first place) will their *omissions* violate the sorts of criminal prohibitions ordinarily reserved for those who act.⁹⁹

Among the people who have a duty to intervene, she argues, are those who have set in motion the chain of events that will, absent intervention, lead to a person's death. As Gur-Arye explains, for example, if someone creates an overwhelming risk that a victim will suffer a fatal injury, and the victim later dies because no one competent intervened to save him from the realization of that risk, the risk creator is responsible for the death.¹⁰⁰ Once a person shoots another, then, the shooter becomes responsible for preventing any foreseeable harm that ensues as a result, regardless of whether a third party makes matters worse by botching or failing to carry out what should have been an easy rescue. Because the shooter in this example can be punished severely for his failure to intervene after the shooting, the argument goes, so someone like Explosive Sender (but *unlike* Bomb Admirer) may be subject to torture for failing to reveal life-saving information, as a matter of self-defense.

I would conceptualize this approach to interrogational torture as “self-defense against a delegated threat” and elaborate it as follows. Though the captive Explosive Sender is no longer a threat in the way that the contemporaneously attacking Intruding Strangler is, Sender is in some sense a continuing threat via a proxy—in Sender's case, Dynamite Holder. Sender controls Holder from afar by having sent her to carry out a suicide bombing (and by possessing information that could, if divulged, prevent her from completing their joint mission). Similarly,

⁹⁸ See Gur-Arye, *supra* note 94, at 183-84 (“Although some readers may object to the potential toleration of interrogational force at all, my proposal would absolutely forbid such methods against those who did not directly cause the potential danger in the first place. . .”).

⁹⁹ *Id.* (“It is important to note that even in legal systems imposing Good Samaritan legal duty (mainly in Europe), the Bad Samaritan is not held liable for the consequences that she could have prevented. Unlike Moore, those legal systems do not see the Bad Samaritan as part of the threat to the person endangered.”).

¹⁰⁰ See *id.* at 194-95 (“Most legal systems tend to treat equally those whose acts have harmed other persons and those whose acts have created only a danger of harm but who later refrain from intervening to save other persons from being harmed.”).

Oxygen Robber could be said to constitute a continuing threat to Asthmatic Homeowner, even after the smoke is in the air and the inhaler hidden. On this approach, for the captor to act in self-defense, in Sender's case, is for her to act aggressively (through torture) in a manner that takes into account the distance (a distance put in place by the aggressor) between Sender and his instrument of destruction (Holder).

Sender, like Oxygen Robber and Intruding Strangler in our earlier examples, has several of the attributes of an aggressive attacker. Like both of the other would-be killers, Sender is a wrongdoer. He is, in other words, the person who actively and deliberately put in place the circumstances that now threaten the lives of innocent people. By contrast to Bomb Admirer, Sender is not simply a useful (knowledgeable) bystander who could help but chooses not to. Sender is *the* bad guy.

In addition to his wrongdoing, Sender is capable of stopping the harm he has set in motion (by revealing what he knows) and thus also of protecting himself from the threatened interrogational torture. He is, in other words, not defenseless. As we have seen, two factors play a preliminary role in distinguishing justifiable killing and torture in self-defense from unjustifiable instances of killing and torture. These factors are: first, wrongdoing by the torture target, and second, the target's ability to comply and surrender and thereby to avoid or end the threat of torture or death to himself while simultaneously saving lives.

b. The Wrongdoing Factor

To appreciate the importance of wrongdoing, consider a slight variation on one of the scenarios that we have examined. Imagine that Suburban Prey's neighbor sees Intruding Strangler break into Suburban Prey's home. The neighbor, who observes what is happening through her window, calls the police. The police happen to have present in their stationhouse Son Of Strangler, Strangler's beloved 15-year-old son (who came to the police to report the theft of his bicycle). The police immediately call Suburban Prey's home, get the answering machine, and start torturing Son Of Strangler so that his father can hear the boy's authentic screams. Intruding Strangler, recognizing the sound of his son's voice and the anguish his son is experiencing, immediately releases his victim, as the police anticipated he would do, and picks up the phone, begging the police to stop harming his son, a request to which they promptly accede as Prey makes her escape.

Did the police do the right thing here? Most moral theorists (and I)

would say no.¹⁰¹ Though *Strangler* is a wrongdoer, his son Son is not. Son—even more so than Bomb Admirer—has not behaved in a manner that would compromise the rights that every person possesses (including, by most moral accounts, the right not to be subjected to torture).

c. Capacity to Comply

A second factor distinguishes Son of Strangler from Intruding Strangler and Bomb Admirer. Unlike the latter two people, Son Of Strangler is not only completely innocent but also utterly defenseless. All he can do is cry out in pain until his father will no longer tolerate his suffering. There is nothing Son can surrender to the police that will prevent them from torturing him. Because he is both innocent and defenseless, he is fully entitled to be free of deliberate killing and torture, regardless of how effective such measures might be in manipulating his father to let go of Prey.

The second variation on the Strangler scenario exposes another morally significant distinction—that between what the police are doing to Strangler—psychologically tormenting a powerful wrongdoer by physically torturing his son—and what they are doing to Son Of Strangler himself—torturing an innocent and defenseless person. The latter of these is, by most accounts, a moral wrong. The wrongfulness of the former is perhaps less clear. In a novel entitled *Just Revenge*, (beware of plot spoiler) Alan Dershowitz writes of a character who survived the Holocaust only later to find the Nazi who had tortured him and killed his children during the War, enjoying a fulfilling life with his beloved family in the United States, under an assumed identity.¹⁰² The survivor is unable to find justice in a court of law, so he designs a revenge plot in which the Nazi is forced to watch videotapes of his own child and grandson being murdered, after which he is given the option

¹⁰¹ See Andrew C. McCarthy, *Torture: Thinking About the Unthinkable*, in TORTURE DEBATE, *supra* note 1, at 98, 107 (asserting that most people would be opposed to the torture of an innocent, “like harming a terrorist’s children to induce him to talk”); Moore, *supra* note 27, at 292 (“No one should torture innocent children—even when done to produce a sizeable gain in aggregate welfare.”); *id.* at 293 (“If I were a Russian . . . I would be deeply ashamed that the security force that acts in my name (the KGB) castrated and killed an innocent Arab who happened to be the brother of one of the terrorists . . . even though that act brought about the release of the kidnapped diplomats. . . .”). Police, for example, may not torture or threaten family members of a kidnapper as a means of motivating the kidnapper to release his victim. See Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 271 n.56 (1996) (“A police officer cannot torture the sister of a gang member in order to prevent him from torturing other innocent persons.”).

¹⁰² ALAN DERSHOWITZ, *JUST REVENGE* (1999).

(which he takes) of committing suicide.¹⁰³

After the Nazi's suicide, the reader learns that none of the man's family members were actually harmed. The videotapes were doctored so that the Holocaust survivor's tormentor would suffer some of the anguish that the survivor himself had experienced but without any innocent people coming to real harm. The book does not exactly embrace the survivor's actions, although it is sympathetic to him (as most readers would presumably be), and the novel's title offers the possibility that justice has been served. By hurting only the man who hurt him—only the wrongdoer—the survivor chose his victim well. And even if one strongly believes that revenge is an illegitimate enterprise, a belief that the novel does not rule out, one can still see that there is an important moral distinction between what the survivor did to the Nazi and what he might have done (but did not in fact do) to the Nazi's family.

In the case of interrogational torture, by contrast to revenge, the objective is not to satisfy a desire for retribution but to save lives. More is generally permissible in the service of saving lives than in the course of punishment or revenge. Under the criminal law, for example, a would-be rape victim may kill her assailant in self-defense, but a rapist may not, after the fact, be executed as a punishment for his crime, as such punishment runs afoul of the Eighth Amendment ban on cruel and unusual punishments.¹⁰⁴

Even if saving a life is a more worthy enterprise than retribution, however, the status of the target of action in the service of *either one* of these objectives is significant: deliberately bringing pain and death to the innocent is quite broadly viewed as unacceptable, while wrongdoers may be said to bring some violence—in the form, at the very least, of self-defense torture or death—onto themselves. It is by analogy to self-defense that we find the survivor's actions in *Just Revenge* forgivable, if not justifiable, because they are limited to harming the guilty Nazi.

2. How Interrogational Torture Utilizes the Tortured

If some view the torture of Explosive Sender (the terrorist) as the moral equivalent of Suburban Prey's uncontroversially legitimate torture of Intruding Strangler, then why do others argue that it is wrong to torture Explosive Sender but right to torture Intruding Strangler? The distinction cannot be between death and torture, for in both cases, torture is at stake. In both cases, moreover, the target of the torture is a

¹⁰³ *Id.* at 147-55.

¹⁰⁴ Compare MODEL PENAL CODE § 3.04(1)(b)(1) (2007) (permitting deadly force to protect against rape), with *Coker v. Georgia*, 433 U.S. 584 (1977).

wrongdoer and poses (or participates in) a current threat—Intruding Strangler directly and Explosive Sender by his proxy, Dynamite Holder, to whom he has delegated the job of explosive device. And finally, both Intruding Strangler and Explosive Sender are capable of terminating their own torture or avoiding it altogether by surrendering. In Strangler's case, he can surrender Prey and thereby preserve her life; in Sender's case, he can disclose Holder's location and thus foil the murder-suicide plot. Neither is therefore defenseless.

There is at least one difference between Strangler and Explosive Sender, however. The difference stems from the delegation of the threat in the latter case from Sender to Holder. That delegation does not mitigate Sender's culpability (and may arguably aggravate it, given the law's approach to conspiracy¹⁰⁵), nor does it diminish Sender's capacity to surrender. It does, however, alter the nature of what the intending savior of human lives is accomplishing by torturing him.

In the case of Intruding Strangler, Suburban Prey is, by torturing her assailant, disabling him from continuing his attack. The torture—the deliberate infliction of severe pain—is intended, in other words, to make Strangler *stop* what he is doing. In Sender's case, by contrast, the torture is not intended to stop him. It is too late to stop him, precisely because he has already delegated the act of destruction to another entity (by sending his human bomb, Dynamite Holder, on her mission). The torture is thus intended to force Sender to act to help stop *Holder* from carrying out the attack. Indeed, almost by definition, interrogational torture is meant not to disable the person being tortured but, instead, to motivate that person to act affirmatively—to convey information to the torturer. In theory, then, anyone possessing such information could be made useful through torture. The confluence between a person's status as a wrongdoer (i.e., his being the source of unjust aggression) and his utility to the torturer, is accordingly contingent—dependent, that is, on the particular facts of the case—rather than analytic—necessarily so, as it is in the case of self-defense. Almost by definition, in other words, effective self-defense—unlike effective interrogational torture—must target the person who is carrying out the attack. If it fails to do so, it will fail to disable the attack.

Should the contingent nature of this combination (of wrongdoing and utility) matter? To explore this question, we turn from the infliction of torture to the use of deadly force, on the understanding—provided by our discussion of Intruding Strangler and Suburban Prey—that it is the goal the torturer aims to achieve rather than anything inherent in torture

¹⁰⁵ The fact of a conspiracy is aggravating rather than mitigating and accordingly reduces the need for culpable conduct bringing the perpetrators closer to completion of the offense. *See* 16 AM. JUR. 2D *Conspiracy* § 3 (2008) (conspiracy focuses on intent, while attempt focuses on conduct).

itself that might categorically distinguish it from killing.

Consider now the case of Heart Shooter. Shooter works for a man named Gunshot Victim until Victim fires Shooter for poor performance on the job. After her termination, Shooter begins to plot the murder of Victim, believing (without good reason) that her termination was unjustified and must be avenged. Shooter purchases a gun and, according to plan, shoots Victim in the chest at a crowded subway station. Victim is rushed to the hospital, where surgeons discover that he needs a heart transplant by the next day if he is to survive. Everyone agrees that a donor heart will not become available in time.

Upon hearing this news, Gunshot Victim's daughter, Child Of Victim, immediately hatches a plan to save her father. Child kidnaps Heart Shooter and brings her to Gunshot Victim's bedside, at which point Child crushes Shooter's skull with a bat, killing Shooter. Child (who happens to be chief of surgery at the hospital) immediately summons a transplant team to move Shooter's heart from Shooter to Victim. The transplant team—unaware that Child herself killed Shooter—performs the life-saving surgery, and Gunshot Victim receives a healthy prognosis.

We shall shortly examine the moral implications of Child's actions. But first imagine an alternative scenario. What if Gunshot Victim saw Shooter pointing a gun at him at the subway station? At that moment, he could have—with justification—killed Shooter in self—defense. And if Gunshot Victim's daughter Child had witnessed the same scene, then she too could—with equal justification—have killed Shooter. Like Suburban Prey vis-à-vis Intruding Strangler in our earlier example, either Gunshot Victim or Child Of Victim could subject Shooter to whatever was necessary (reasonably consistent with other travelers' safety) to disable the latter from pulling the trigger in Gunshot Victim's direction.

But does this resolution of the alternative scenario mean that Child acts justifiably in the first scenario when she kills Shooter for a donor heart? Our intuitions and the criminal law tell us "no" (or, at the very least, "we're ambivalent"), regardless of how firmly we might believe in Child's right to kill Shooter on the subway platform. What distinguishes these two cases from each other?

Let us first consider the ways in which the two scenarios are the same. In both cases, the person to be killed—Shooter—is a wrongdoer. Indeed, she may be more culpable in the first scenario, because she has already carried out her intention to shoot (and attempt to kill) Gunshot Victim. In the alternative scenario, it was still possible for Shooter to change her mind at the last moment and hold her fire. Yet it is in the *first* example (of heart donation, where the target is more culpable) and *not* the second example (of killing on the subway platform, where the

target may be less culpable) that moral ambivalence about—or outright opposition to—the killing of Shooter emerges. So Shooter's culpability or wrongdoing alone cannot supply the key to distinguishing between the two scenarios.

What about the power or defenselessness of the target? In scenario 1, when Shooter is killed for her heart, she is obviously defenseless. There is nothing that she can do that will call off the assault—Child wants her heart for Gunshot Victim and may not acquire it without causing Shooter's death. It is too late for Shooter to save Gunshot Victim without herself dying.

Does the defenselessness of Shooter the heart donor (scenario 1) necessarily distinguish her from Shooter the attempted assassin who has not yet fired her weapon (scenario 2, where killing her is justifiable)? In an important sense, Shooter the attempted assassin, once she has pointed a gun at her quarry, has already—like Shooter the heart donor—passed the point of no return. Neither Gunshot Victim nor Child Of Victim has a legal obligation even to warn Shooter that she will die if she does not drop her weapon, partly because such a warning could easily result in Shooter's more quickly pulling the trigger.¹⁰⁶

Shooter the attempted assassin has therefore, effectively, become defenseless at the moment that she arrived one step away from killing Gunshot Victim. She may therefore be killed immediately, in self-defense. Similarly, in our first scenario (Shooter the heart donor), there is nothing that Shooter can do to avoid Child's killing her for her heart. Accordingly, like wrongdoing, defenselessness at the relevant moment cannot help us differentiate between these two scenarios.

What about the stakes? That is, what are the respective consequences of failing to act in the proposed manner, under each set of circumstances? In the second (attempted assassin) scenario, a failure to act (i.e., to shoot or otherwise attack Shooter) will likely lead to Gunshot Victim's death by shooting. In the first (heart donor) scenario, failing to act will likely lead to Gunshot Victim's death, also by shooting (though including the intervening failure to supply a replacement for the heart destroyed in the shooting). The stakes may in fact be higher in the first (heart donor) scenario: uncertainties in the second (attempted assassin) scenario about whether Heart Shooter will actually shoot Gunshot Victim at all and whether, if she does, her shot will in fact damage a vital organ, make Gunshot Victim's survival far more likely in the second (attempted assassin) scenario than it is in the first (heart donor), where we know that he will die without a

¹⁰⁶ A police officer, for example, must issue a warning before shooting only if she can do so without grave risk to herself. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (Police may use deadly force against a dangerous fleeing felon "if necessary to prevent escape, and if, where feasible, some warning has been given.") (emphasis added).

replacement heart and where we have great confidence that no replacement heart will become available in time through normal channels.

If anything, then, based on the stakes, action is more warranted in the first (heart donor) scenario—where inaction will almost certainly lead to Gunshot Victim's death—than in the second (attempted assassin), where there are more unknowns. In short, both scenarios involve a wrongdoer who is now a defenseless target of deadly force, and both likewise involve a grave risk of death to an utterly innocent party if deadly force is *not* used.

There is, however, one important difference between the two scenarios. In the first (heart donor) scenario, Child Of Victim kills Heart Shooter to make Shooter useful to Gunshot Victim in a particular way—as a source of a vital organ, her heart. Child, in other words, is not killing Shooter to prevent the latter from engaging in wrongdoing—Shooter has already so engaged, and the question now is only how much harm will result.

Child is killing Shooter to use her organ to save Gunshot Victim's life. We see this, for example, in the method by which the killing is accomplished: unlike in the second (attempted assassin) scenario, Child could not save her father by shooting Shooter in the heart, for example, because Child wishes to harvest that heart. To disable a predator is therefore *not* the goal in the first scenario; the goal is, instead, to acquire a donor heart from someone who happens to be the shooter.

The notion that killing a wrongdoer who will be *useful* once dead is worse than killing (and thus disabling) a wrongdoer who will no longer be useful once dead is, to some degree, perverse. In the attempted assassin scenario, killing Heart Shooter does save Gunshot Victim's life, but Shooter's death is itself a waste. Assuming that Shooter, by threatening Gunshot Victim's life, did not forever forfeit her interest in living (an assumption that is implicit in the legal prohibition against killing her that returns after she has been disarmed), it would have been better if Shooter did not actually die from Child's attack, as long as she was successfully disabled from killing Gunshot Victim. Though Child intends to kill Shooter on the subway platform (in the attempted assassin scenario), in other words, the *objective* of the killing is to prevent Shooter from herself killing Gunshot Victim. If this end were served and the killing of Shooter somehow averted as well, that would be the better outcome.

In the heart donor scenario, by contrast, Shooter's death is not a waste, because her heart—which cannot be transplanted without killing her—provides Gunshot Victim with a second chance at life. Shooter's death is, accordingly, not in vain and is a necessary component of accomplishing the objective that Child seeks in killing Shooter. Why

should that fact itself make Child's killing of Shooter somehow *worse* than it would have been on the subway platform?

One answer is what we might call an "acoustic separation"¹⁰⁷ that we properly erect between our assessments, respectively, of wrongful, threatening actions (such as Heart Shooter's on the subway platform) and later consequences that follow from such actions (such as Gunshot Victim's need for a heart). One can justifiably respond to—and defuse—a threat by killing or torturing the source of that threat, so long as the killing or torture is *itself* expected to defuse the threat by disabling its source. Things change, however, once the threat created by the source has acquired a life of its own, such that killing or torturing the source (and thus disabling him) cannot—in and of itself—defuse the threat. At that point, the act of killing or torturing the source becomes a means of harvesting human "parts" (whether they be actual parts, such as organs, or information) rather than of disabling an aggressor.

Why does the distinction—between a target's threatening actions and the later (but also threatening) ramifications of those actions—matter to our intuitions about when violence is or is not justifiable? I suggest that it is because in addressing the latter ramifications (whether they consist of the need for a heart or the need for information), the source's utility as a resource is now only *contingently* linked with the source's wrongdoing, i.e., his having generated the threat in the first place.

For a concrete illustration, imagine that Child, instead of killing Shooter, had killed a passing nurse or another (heart-healthy) patient at the hospital to obtain a heart for Gunshot Victim. This action would have served the objective of saving Child's father's life (by providing a donor heart) just as well as killing Shooter did. Child apparently selected her target because of Shooter's direct responsibility for Gunshot Victim's dire circumstances—Shooter's status as a wrongdoer—but the target's utility as a heart donor does not turn at all on this status. Shooter's having been the one to deprive Gunshot Victim of a usable heart does not contribute in any way to her qualification as a donor. The relationship between wrongdoing and utility in Shooter's case is accordingly contingent—dependent on the particular facts here—rather than analytic—logically necessary by virtue of the fact that disabling anyone other than the source of a threat will do nothing to defuse the threat.

To further appreciate the significance of this contingent

¹⁰⁷ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (developing the concept of an acoustic separation between primary rules governing private parties—indicating what they should and should not be doing—and regulations on government officials—which direct the methods by which such officials may attempt to bring about private compliance with the primary rules).

relationship between wrongdoing and utility, consider an example from the canon of moral dilemmas: the lifeboat.¹⁰⁸ Several people occupy a lifeboat which lacks sufficient food to enable anyone to survive long enough to reach shore. If all of the occupants of the lifeboat refrain from violence, then all will almost certainly die. If, on the other hand, the members of the crew set upon one of their number and kill and devour him, then all but that one victim will likely survive. From an act utilitarian perspective, the case is a slam dunk—the group should kill and eat one person to save the others rather than allowing everyone to die.¹⁰⁹

Many will have the intuition that it is morally wrong (though perhaps understandable and even excusable) to kill and use a fellow human being for his meat¹¹⁰ when that human being's existence does not threaten that of any other occupant of the lifeboat. This counter-utilitarian intuition, moreover, does not entirely disappear even if we posit that the selected meat source happens also to have created the dire circumstances in the first place, perhaps by throwing a box of food and water into the sea at the beginning of the journey to make space for himself on the lifeboat.

In the case of true self-defense, the target of deadly force or torture himself *necessarily* occupies two roles: he is the person who poses the threat, *and* he is the person whose death or suffering of torture is an effective means of dissipating that threat. In the lifeboat scenario (the one in which the meat source created the problem by throwing food and water overboard) *and* in the Heart Shooter heart-donor scenario, by contrast, it is only a coincidence or, as here, a choice—by the hungry crew members or by Child Of Victim, respectively—that unites in one person the creator of the circumstances that threaten life and the useful means of exiting those circumstances. One could be entirely innocent, in other words, and serve the needs of the dying Gunshot Victim or the dying life-boat crew equally well. Heart Shooter and the meat source just happen to be both wrongdoers and useful at the same time.

The analogy to interrogational torture is probably, by now, apparent. The person to be tortured may or may not have created the circumstances under which the intentional infliction of severe pain is necessary to the successful extraction of life-saving information. Like Explosive Sender, the torture target might have set the “ticking bomb” in a crowded building. Like Bomb Admirer, he might instead be a

¹⁰⁸ See, e.g., *Regina v. Dudley and Stevens*, (1884) 14 Q.B.D. 273.

¹⁰⁹ For discussion of these and related problems, see SHELLY KAGAN, *NORMATIVE ETHICS* 71 (1998); RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 76 (1992).

¹¹⁰ Note that to a growing number of people, it also seems wrong to do this to any sentient animal, particularly because we are not on a lifeboat and can survive and even thrive without consuming our fellow animals. See, e.g., GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* (2000).

bystander who believes in Sender's agenda but who came into the information innocently and without having participated in the plot. Or, like Intruding Strangler's 15-year-old son, Son Of Strangler (tortured to pressure Strangler to stop killing Suburban Prey), the torture target might be entirely innocent—ignorant of the life-saving information at issue but nonetheless useful, like a passing nurse or other patient at Gunshot Victim's hospital.

The efficacy of torture in saving lives in the ticking bomb scenario does not turn on which of these three people is the target. In that sense, utility is divorced from wrongdoing. Unlike in the case of self-defense, then, the willingness to kill or cause severe pain to one person (through interrogational torture or extracting a heart) in order to save the lives of other people is, at a fundamental level, unmoored from a wrongdoing-dependent, deontological approach to justifiable violence.

Indeed, those among deontologists who allow for the existence of circumstances under which torture is permissible recognize the utilitarian foundation of interrogational torture. Michael Moore, for example, has defended the use of interrogational torture in the "ticking bomb" scenario on the ground that the scenario crosses a catastrophic-consequences threshold. He also embraces an equivalence between people like Explosive Sender (who set the ticking bombs of the world) and people like Bomb Admirer (who simply refuse to disclose the locations of those ticking bombs), because revealing the information that would save lives is so easy that a refusal to disclose is tantamount to murder.¹¹¹

We have already examined a response to this suggestion.¹¹² Such a proposed equivalence is radically at odds with our current legal system and, to a great extent, with people's moral intuitions. It is nonetheless tempting to equate these two sorts of people (Explosive Sender and Bomb Admirer) because the respective *utility* of torturing each of them is exactly the same. That is, we need to torture Bomb Admirer as much as we need to torture Explosive Sender. Accordingly, if the ability to justify the use of whichever one of them happens to land in our custody depends upon a finding that they are equally engaged in wrongdoing, then we are motivated to find that they are indeed thus equally engaged. And Moore, understandably, does just that.

Consider, however, what would happen if the two men were on trial for homicide after the ticking bomb had exploded and killed scores of people. It is unlikely that we would have the law treat them as equal in guilt. By hypothesis, neither one told the authorities how to prevent the explosion of Dynamite Holder in the crowded building. But Explosive Sender—unlike Bomb Admirer—actually *set* the lethal

¹¹¹ See Moore, *supra* note 27, at 325.

¹¹² See *supra* text accompanying notes 92-100.

events in motion and therefore bears a far greater responsibility for what occurred than his friend Admirer does.

Once we have loosened our wrongdoing precondition for defensible killing or torture, moreover, the use of an innocent child (like Son Of Strangler) to motivate the killer might also come to seem acceptable. After all, such torture is *just as useful* in the saving of human life as the torture of the bomb-setter and of the knowledgeable bystander, and we will have already compromised on the wrongdoing condition in the latter case. Once we allow the link between wrongdoing and utility to be contingent, the slide to pure utility is difficult to resist.

It is therefore not that surprising that, having allowed the Bad Samaritan bystander, Bomb Admirer, to satisfy the wrongdoing condition, Moore goes on to say that he does consider morally proper the torture of an innocent person if such torture is truly the only available way to avert a huge catastrophe.¹¹³ He would not, however, want this particular allowance codified into the law.¹¹⁴ This is perhaps in part because even though such torture might be justifiable (assuming that consequences, above some catastrophic threshold, could be dispositive), the torture of an uncontroversially innocent person remains morally repugnant and could convey the wrong message about what is and what is not acceptable in the service of saving lives. Moore appears to believe that torturing an innocent person, to draw on Michael Walzer's argument in his famous 1973 essay, dirties one's hands even when duty might obligate one to do so.¹¹⁵

Notice, moreover, that whether it is a deontologist like Moore or a utilitarian like Bagaric or Clarke,¹¹⁶ theorists generally argue that to justify interrogational torture, there ought to be a large number of people whose lives hang in the balance.¹¹⁷ It is interesting as well that a

¹¹³ Moore, *supra* note 27, at 330 ("To justify torturing one innocent person requires that there be horrendous consequences attached to not torturing that person—the destruction of an entire city, or, perhaps, of a lifeboat or building full of people.").

¹¹⁴ *Id.* at 331 ("That this is a psychological danger [the slippery slope from torturing an innocent person to avert catastrophe to torturing an innocent person whenever the beneficial consequences outweigh the harm] is a reason not to tell people that there are thresholds of awfulness that justify *prima facie* immoral behavior. It is not a reason to doubt that there are such moral thresholds for consequential calculation."). Moore therefore concludes that "Israeli Law should contain a flat ban on torture of innocents." *Id.* at 341.

¹¹⁵ See Walzer, *supra* note 3.

¹¹⁶ Bagaric & Clarke I, *supra* note 17; Bagaric & Clarke II, *supra* note 17.

¹¹⁷ Bagaric & Clarke I, *supra* note 17, at 611 ("The key consideration regarding the permissibility of torture is the magnitude of harm that is sought to be prevented. To this end, the appropriate measure is the number of lives that are likely to be lost if the threatened harm is not alleviated."); Bagaric & Clarke II, *supra* note 17, at 714 ("In assessing the potential dehumanizing aspect of a proposal . . . [a]ll affected parties must be given equal consideration. Sure speculative consequences (in this case the likelihood that the attack will be actually averted) weigh less than certain consequences (the pain inflicted on the suspect), but at some point the

utilitarian would remain at least somewhat wedded to the wrongdoing of the target,¹¹⁸ though this precondition to torture is associated with a deontological approach. Note that both sorts of anti-absolutist theorists agree that if a *large* number of people can be rescued through the torture of one *guilty* person, then such torture is acceptable.¹¹⁹

If we are truly dealing with the moral equivalent of self-defense, however, then there should be no need to insist on large numbers. Neither the law of self-defense nor philosophical expositions of the scope of the self-defense justification require us to count how many lives can be saved by killing an aggressor who threatens a person's life.¹²⁰ That every one of us can kill someone who is attempting to kill us—at least in the absence of safe alternatives¹²¹—is a foundational individual right, and it accordingly belongs to every individual, not merely to groups of people. Indeed, many would agree that even if saving oneself required the killing of many aggressors, such a killing would be justifiable self-defense, notwithstanding the fact that, on the numbers, surrender to murder would result in a lesser net loss of life.¹²²

In the case of interrogational torture, however, matters are different, even for those who muster arguments on its behalf. On the law, it appears, the only potential defense to such conduct is the “necessity” defense,¹²³ and this defense is entirely one about

speculative side of the scales (where, for example, there are a large number of lives at stake) are so heavy that they outweigh certain negative consequences.”); Moore, *supra* note 27, at 328 (“It just isn’t true that one should allow a nuclear war rather than killing or torturing an innocent person. It isn’t even true that one should allow the destruction of a sizable city by a terrorist nuclear device rather than kill or torture an innocent person.”).

¹¹⁸ Bagaric & Clarke I, *supra* note 17, at 612 (“As a general rule torture should normally be confined to people that are responsible in some way for the threatened harm.”).

¹¹⁹ See, e.g., Moore, *supra* note 27, at 333 (“[T]he moral ban against torture applies less firmly to those who culpably cause the need for torture by planting the bomb that needs removal, etc.; such persons may be tortured when absolutely necessary to remove the threat that they have caused.”); Bagaric & Clarke I, *supra* note 17, at 612 (“As a general rule torture should normally be confined to people that are responsible in some way for the threatened harm.”).

¹²⁰ See, e.g., Amy J. Sepinwall, *Defense of Others and Defenseless “Others”*, 17 YALE J.L. & FEMINISM 327, 358 (“[S]elf-defense has been deemed justifiable even where there is more than one attacker, and the threatened individual kills them all.”); Wasserman, *supra* note 62, at 359 (“[A] single victim is permitted to kill any number of intentional aggressors if it is necessary for his survival.”). One real-world example of a defendant who asserted (and prevailed at his trial on) a claim of right to shoot at multiple assailants in self-defense was the case of Bernhard Goetz. On the question whether he was indeed acting in self-defense, see GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988).

¹²¹ Compare 18 PA. CONS. STAT. ANN. § 505(b)(2)(ii) (West 2008) (requiring retreat, if safe, as a pre-condition to lethal self-defense) with ALA. CODE 13A-3-23(b) (2008) (rejecting a duty to retreat in favor of the right to stand one’s ground) and FLA. STAT. § 776.013(3) (2007) (same).

¹²² See Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 746 (2000) (explaining that self-defense “applies irrespective of the number of assailants”) (discussing Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, in BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 109, 117-19 (1987)).

¹²³ See Committee against Torture v. Israel, *supra* note 73, at 178 (explaining that although a

consequences: we do what we have to do to avert a greater harm.¹²⁴ For Moore, a deontologist, one must face a catastrophic threat before one has passed the threshold at which consequences trump principle.¹²⁵ And when the consequences are grave enough, even the torture of an innocent may be justifiable.¹²⁶

Others, too, invoke catastrophic threats and suggest that torture might be or is justified then and only then.¹²⁷ One has the distinct impression, however, that perhaps one is not truly “justifying” torture of the innocent so much as predicting that it would take place¹²⁸ or demonstrating an understanding of (and perhaps relief in) the generally reluctant torturer’s decision to set aside his scruples long enough to prevent the “heavens” from falling.¹²⁹

E. *Reducing the Stakes for the Target*

We have seen that when the proposed life-saving intervention is to inflict extreme violence on a target, as in the case of Heart Shooter and Gunshot Victim, our intuitions demand a tight, nearly-analytic link between the target’s wrongdoing and the utility of his death in saving

criminal defendant might be able to avail herself of a necessity defense, the question before the Court was whether one could thereby infer advance authority for physical interrogation, a question which the Court answered no; Gross, *supra* note 26, at 240-41 (“[T]hrough a mechanism of extralegal action I would term *official disobedience*: in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats *may* entail going outside the legal order Those officials must assume the risks involved in acting extralegally.”); Kreimer, *supra* note 75, at 324-25 (contending that although a ticking bomb scenario might lead reasonable minds to differ on the permissibility of torture, “on the question of whether scholars or courts should announce before the fact that the Constitution permits torture, the answer seems clearer: ours is not a Constitution that condones such actions.”).

¹²⁴ MODEL PENAL CODE § 3.02(1) (2008) (“Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”); see also George C. Christie, *The Defense of Legal Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999).

¹²⁵ Moore, *supra* note 27, at 330. (“A consequentialist is committed by her moral theory to saying that torture of one person is justified whenever it is necessary to prevent the torture of two or more. The agent-relative view, even as here modified, is not committed to this proposition. To justify torturing one innocent person requires that there be horrendous consequences attached to not torturing that person—the destruction of an entire city, or, perhaps, of a lifeboat or building full of people.”).

¹²⁶ *Id.*

¹²⁷ See Bagaric & Clarke I, *supra* note 17, at 611 (“Lesser [than death] forms of threatened harm will not justify torture.”); Miriam Gur-Arye, *supra* note 94, at 195 (“The use of force in interrogation . . . may only be justified in limited cases of an imminent threat of a concrete terrorist attack—ticking bomb situations in its narrow sense.”).

¹²⁸ See Dershowitz, *supra* note 1, at 266. (observing that virtually everyone in his audiences respond affirmatively to the question: “How many of you think that nonlethal torture *would* be used if we were ever confronted with a ticking time bomb terrorist case?”).

¹²⁹ See Dorfman, *supra* note 19, at 15.

someone's life. This demand helps account for the otherwise odd requirement, typically articulated by those who defend torture in limited circumstances, that there be a catastrophic threat in place (rather than a threat to one life) before torture becomes permissible: unlike in self-defense killing, the looser link between wrongdoing and utility must be made up for in the amount of utility. We turn now to the question whether reducing the stakes for the target (from death to something less intrusive) might alter the demand for such a close tie between wrongdoing and utility.

To explore the effect of reducing the proposed harm to the target, consider a variation on the first Heart Shooter/Gunshot Victim hypothetical case. Imagine that instead of heart failure, Gunshot Victim suffers kidney failure as a direct result of Shooter's actions on the subway platform. Gunshot Victim needs a new kidney in order to survive, and none will be available within the necessary time window.¹³⁰ This time, Child Of Victim kidnaps Heart Shooter and questions her (without torture, for our purposes), learning from her answers that a kidney from Shooter would be compatible with Gunshot Victim's blood and tissue types. At that point, Child forges a donation "consent" letter and drugs Shooter, who promptly becomes unconscious. Child brings Shooter to the hospital and, as in the heart donation scenario, is able to assemble a surgical team that, ignorant of the circumstances, transplants one of Shooter's kidneys into Gunshot Victim, who survives as a result.

Once again, most of us would likely have the intuition that what Child did was wrong (though, again, perhaps understandable). She cannot farm Shooter for an organ, notwithstanding the fact that Shooter engaged in wrongdoing by having directly created the circumstances under which Gunshot Victim needs the organ transplant *and* notwithstanding the fact that from a utilitarian perspective, the transplant is desirable: Shooter will survive (albeit with some health risks that she would not otherwise have assumed), and Gunshot Victim will survive, which he otherwise could not have done. In spite of the coincidental alignment of wrongdoing and utility-of-target—in addition to the maximization of human survival—extracting a kidney from an unwilling donor seems to many of us far too extreme an imposition to be justifiable.

Now vary the scenario once again. Imagine that Shooter is traveling in an ambulance with Gunshot Victim, because there were not enough personnel at the scene of the shooting to bring Shooter to jail and Gunshot Victim to the hospital separately. The ambulance is stuck in gridlock traffic and will not be able to reach any hospital in time to

¹³⁰ Assume, for purposes of this case, that dialysis is not an option.

prevent Gunshot Victim from dying of the blood loss he has already sustained. Supplies in the ambulance have run out. The paramedic yells out the door asking if anyone in the traffic jam would be willing to donate blood, but no one responds affirmatively to the plea.

Gunshot Victim has not lost any vital organs, but he needs blood immediately. The paramedic cannot provide his own blood, because he is anemic and would lose consciousness (and thus become unable to transfuse the blood) if he were to donate more than a trivial amount.

The paramedic asks Shooter if she would be willing to donate, and she responds, "Absolutely not. I could certainly spare the blood—I have successfully donated blood on many occasions and was about to donate again tomorrow. However, Gunshot Victim deserves to die. He is evil for firing me without a good reason."

Despite Shooter's protests, the paramedic manages to restrain Shooter, who is already in handcuffs and leg irons, and proceeds to take a pint of blood from her for immediate transfusion into Gunshot Victim. Traffic eventually clears, and as a result of the transfusion, Gunshot Victim survives the trip to the hospital, where he receives more blood from available supplies.

Did the paramedic do anything wrong? This fact pattern presents a harder case than the kidney (or heart) donation scenarios. We know from what Shooter said that she will not suffer any substantial harm from losing some blood and will therefore not experience anything like the sort of loss that accompanies the donation of a heart or even a kidney. She is, in addition, a wrongdoer for having made Gunshot Victim lose so much blood that he must receive an immediate transfusion or die. Her reason for refusing is wrongful as well—she refuses because she wants him to die of her having shot him. Though we might feel uncomfortable about allowing the paramedic to take Shooter's blood against her will, it is not obviously the wrong thing to do.

What distinguishes the taking of blood from the removal of an organ? It is the relatively innocuous nature of the intrusion on the target. In a different context, the Supreme Court examined the significance of a blood draw in *Schmerber v. California*.¹³¹ The Court there held that taking blood from a non-consenting drunk-driving suspect on the basis of probable cause violates neither the Fifth Amendment (because bleeding is not "bearing witness")¹³² nor the

¹³¹ *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (finding reasonable the taking of blood from a DUI suspect).

¹³² *Id.* at 765 ("Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.").

Fourth Amendment (because it is a “reasonable” search).¹³³ One component of the Court’s analysis relied on the recognition that taking blood from a person is a relatively routine and low-risk procedure.¹³⁴ It accordingly does not violate any fundamental right and is constitutionally proper, provided there is good reason to think the blood will provide evidence against the suspect.

This ruling, to the extent that one finds it persuasive, has application to the Heart Shooter/Gunshot Victim story. Here too, the taking of Shooter’s blood will not cause her serious injury or lasting physical harm, and the pain associated with the insertion of a needle is minimal. Though the quantity of blood is greater in our donation case than in a blood/alcohol content test case, we know from Shooter that she was prepared to donate the next day and therefore assesses the risk to herself from donation to be acceptable, an assessment shared by the medical community with respect to most potential donors. And significantly, in both *Schmerber* and our scenario, the authorities are taking blood from a particular person because that person combines suspected wrongdoing with utility: taking blood from him or her targets the suspected wrongdoer and simultaneously assists, alternately, in the prosecution of a man for drunk driving or in the saving of a man from bleeding to death. The reduced harm to be inflicted, then, renders more acceptable than otherwise our reliance on a looser and contingent (though, importantly, *extant*) wrongdoing-utility connection.

F. *The Wrongdoing/Utility Link and the Question of Interrogational Torture*

The foregoing examples, I believe, show that what distinguishes the heart donation scenario involving Heart Shooter and Gunshot Victim from true self-defense is the accidental or contingent connection between wrongdoing and utility. This differs from the scenario involving Heart Shooter the attempted assassin on the subway platform—where Child of Victim kills Shooter to disable her from shooting Gunshot Victim. In the case of Shooter the organ donor, Child could obtain a useful heart from a different (unwilling) donor. There is nothing special about Shooter that makes her uniquely useful as a donor, in other words. Her wrongdoing simply makes her a morally *appealing* target because she happens to have given rise to the circumstances necessitating a donation in the first place.

¹³³ *Id.* at 771 (“[T]he test chosen to measure petitioner’s blood-alcohol level was a reasonable one.”).

¹³⁴ *Id.* (“Such tests are a commonplace . . . and . . . for most people the procedure involves virtually no risk, trauma, or pain.”).

After all of this discussion, of course, one might still believe that interrogational torture is, in some circumstances, justifiable, like self-defense, even if farming organs from Shooter to save Gunshot Victim never is. What might account for this intuition?

One difference between interrogational torture and the farming of Shooter's heart is that in the "ticking bomb" situation, the reason that the particular target is the one selected for torture—the information he holds—is logically connected to (though it does not require) his having played a role in setting the bomb in the first place. That is, the putatively justified torturer selects his particular target because, for the most part, only someone who can reveal information about the bomb plot will be of any use in defusing the bomb. Someone who does have information to reveal, in turn, is likely to have participated in some way in the setting of the bomb, particularly if he would resist demands by law enforcement that he provide the information that he knows, as Explosive Sender would.

In the heart and kidney donation scenarios, by contrast, what makes Shooter useful to the project of saving Gunshot Victim's life has *nothing* to do with her having shot him. From the point of view of utility, there is no reason at all to prefer a "guilty" organ donor to an "innocent" organ donor. It is likely, of course, that Child Of Victim in fact *selected* Heart Shooter because she is the wrongdoer, but her identity as the wrongdoer does nothing to enhance her utility. To put the matter differently, when we look for ideal organ donors, we have no health-related reasons for focusing our attention on the population of wrongdoers.

The interrogational torture target's wrongdoing, by contrast, is closely intertwined with his utility. Though Gunshot Victim needs a heart to survive, the use of Heart Shooter *in particular* for her heart is not necessary or even preferable, because many other people's hearts would be just as useful as Shooter's. To save the terrorist's intended group of victims, however, the torture of the particular terrorist would be optimal. Substituting a random innocent person for the terrorist would render the torture entirely useless. Though not quite analytic, then (because non-participants like Bomb Admirer, for example, could, in theory, possess the requisite knowledge), the connection between wrongdoing and utility is generally far tighter in the case of interrogational torture than in our case of involuntary organ donation. In the latter circumstance, the connection is entirely contingent on Child's decision to select Shooter as the donor. It is, I propose, that distinction—between the relative tightness in each case of the link (or fit) between a target's wrongdoing and the utility of harming him—that makes people feel less convinced of the wrongfulness of interrogational torture in the ticking bomb scenario than they are of the wrongfulness of

taking Shooter's heart in the Shooter-the-heart-donor scenario.

III. THE TRULY DEFENSELESS TARGET

The discussion thus far has shown why interrogational torture could be thought justified by some while simultaneously considered unjustified by others in the ticking bomb case. The examples I have explored here operate on the assumption that our hypothetical captive whose torture could save lives truly *holds* the information that his captors demand. On this assumption, the captive to be tortured is capable of avoiding the deliberate infliction of severe pain on his person by revealing what he knows to save the lives in danger. But what if, in reality, he is not capable of doing so? The legitimacy of authorizing the use of extreme force—whether deadly force or torture—must depend on, among other things, how certain we can be that the justifying conditions obtain. In the case of interrogational torture, as Seth Kreimer poignantly suggests, the endpoint will likely turn on the interrogator's appetite for torture rather than on any specific revelation that might self-evidently close the matter between interrogator and captive.¹³⁵ Unlike a "reasonable search" for a material item, Kreimer explains, a torturer generally cannot know—without continuing to torture his subject relentlessly—whether perhaps there is something crucial that the subject has yet to disclose.

Put another way, the use of torture to extract information is an inexact enterprise, even when it "works" in the sense of motivating people to reveal what they know. The torturer cannot determine immediately upon hearing a disclosure from the captive whether the disclosure (a) is accurate, (b) provides sufficient information to save the threatened lives, or (c) represents the entirety of life-saving information known by the captive. To surrender in wartime generally requires only a simple gesture, such as the waving of a white flag. In this sense, surrender in war resembles surrender in a self-defense scenario: when the killer, Intruding Strangler, lets go of the homeowner, Suburban Prey, Prey stops biting Strangler. Surrender in an interrogation room, however, is a far more complicated proposition.

The distinction between killing or torturing people in self-defense (or even shooting them in battle), on the one hand, and torturing them for information, on the other, may accordingly be great, in practice. A given captured terrorist may be linked to any of a number of violent plots, and the torturer—to find out anything useful—will have to inflict

¹³⁵ Kreimer, *supra* note 75, at 307 ("[T]he pain and degradation that may be said to be 'necessary' is limited only by the will of the torturer and the resistance of the tortured.").

pain even after she has learned everything useful that the captive knows, if only to ensure that this is the case.

Rather than killing a person who is attacking an innocent victim, then, the torture that is likely to take place—even with the best of intentions—will be less like self-defense and more like the killing of random, potentially violent people in the hopes that one of them will thereby be foiled in his plan to commit a murder. If killing or causing pain to the defenseless is impermissible, then torture under these circumstances must be as well. The next Part will examine a familiar case that helps dramatize the consequences of using extreme force in the circumstances of uncertainty that must regularly confront interrogators.

A. *The Wages of Uncertainty: Amadou Diallo, Self-Defense, and Interrogational Torture*

In February 1999, four police officers encountered Amadou Diallo, a young, unarmed West African immigrant, and riddled him with forty-one bullets, just outside of his Bronx apartment house. For many Americans, Diallo's death came to symbolize and signify the racism of police officers in New York City and their astonishing willingness to unleash deadly force against a black man who posed no threat to anyone. Others viewed this first reaction to the Diallo shooting as overblown and unfair to the officers, who had reasonably believed that Diallo was reaching for a gun at the time that they shot him. Malcolm Gladwell provides an alternative account of the shooting that rejects both the "police are racists" and the "police acted properly" versions of what took place.¹³⁶

Gladwell explains that when a human being finds herself in a highly stressful and demanding set of circumstances, it is natural and useful for her to absorb salient facts and to draw quick conclusions on the basis of those facts. When a person is familiar with a given setting, she is often able to absorb the most important information around her quickly and efficiently and draw highly accurate conclusions without engaging in much conscious deliberation. Gladwell provides the example of a police officer confronting an armed teenager.¹³⁷ An officer with a wealth of experience may be able to determine with a high degree of confidence whether or not a particular youth will actually shoot at him and thereby make the correct life-or-death judgment in the situation about whether or not to hold his fire.

As Gladwell points out, however, the officers who confronted

¹³⁶ See MALCOLM GLADWELL, *BLINK* 189-97 (2005).

¹³⁷ *Id.* at 239-41.

Amadou Diallo had not accumulated very much experience of the relevant neighborhood or the community living in that neighborhood.¹³⁸ The police accordingly lacked the ability to read the situation that they faced with speed and accuracy.¹³⁹ Significantly, for example, it apparently did not occur to the officers that the person they were confronting might not understand English (and therefore be unable to follow their order that he put his hands in the air).¹⁴⁰ From there followed a series of errors—believing that Diallo was reaching for a gun when he reached for his wallet, and believing that one of the officers had fallen in response to a shot from Diallo's gun—that ultimately led to Diallo's death.

These events were tragic, though they probably resulted from mistakes rather than a concerted effort to execute an unarmed black man. Nonetheless, the mistakes were not inevitable. They were the sorts of mistakes that more experienced officers, familiar with their surroundings, might not have made. The officers in question, in other words, should not have been in a position to make the choices that they made.

In addition to offering a cautionary tale about policing in New York City, the story of Amadou Diallo has something to teach us about the torture question. Police (and private individuals) are ordinarily vested with the right to kill in self-defense (or the defense of others). This right represents a rare moral consensus and thereby provides a foundation for accepting or rejecting other proposed rights, depending on how closely they resemble self-defense. We have been engaging in precisely this sort of analysis of interrogational torture in this Article.

One might believe that interrogational torture is sometimes very much like killing (or torture) in self-defense, as Michael Moore has proposed.¹⁴¹ Nonetheless, one can readily understand that *unlike* classic self-defense situations—where the threat is clear and the defensive response plainly necessary—interrogational torture—even if it is close to a form of self-defense—is far more likely to occur in the sort of fog that clouded the officers' judgment in the Amadou Diallo case. The officers—based on their own beliefs, based—in turn—on their own experiences in the field—may have acted subjectively in self-defense; yet their actions, on the account above, were nonetheless, foreseeably

¹³⁸ *Id.* at 242-43.

¹³⁹ *Id.* at 214 ("We make these kinds of complicated, lightning-fast calculations very well. . . . And this is the puzzle of the Amadou Diallo case, because in the early hours of February 4, 1999, Sean Carroll and his fellow officers for some reason could not do this at all.").

¹⁴⁰ See *NYC Police Officers Acquitted in Diallo Shooting*, FACTS ON FILE WORLD NEWS DIG., Feb. 25, 2000, at 126A2 ("Carroll [the officer who first spotted Diallo] also acknowledged that he never considered that Diallo did not respond to the officers' commands because he did not understand English.").

¹⁴¹ See Moore, *supra* note 27, at 320-25.

and unreasonably, in error.

The cultural barrier between the shooting officers and their target, Diallo, can accordingly help elucidate the informational fog in which interrogators holding a potential terrorist who might possess life-saving information must operate. Like the officers in the Diallo shooting, interrogators holding a captive and intending to torture him might believe that people will die if they do not engage in torture (and that those same people will live if they do engage in torture). But like the Diallo shooters, these interrogators could be running an unacceptably high risk that they are wrong.¹⁴²

If we assume that the interrogators are correct, of course, then their actions may be justified on one of the theories that we have explored.¹⁴³ The chances are great, however, that they are mistaken about their captive (e.g., he lacks current and accurate information that would help the interrogators avert a correctly-anticipated catastrophe or there is no catastrophe to avert, in the given case). If they are mistaken, as they—like police officers roving around a neighborhood they do not understand—are likely regularly to be, then their torture of the suspect will produce unwarranted, unnecessary, and undeserved suffering that benefits no one. By the time interrogators realize that there is nothing to be gained, moreover, like the Diallo shooters, they might well have done irreparable harm, producing behavior that appears to confirm

¹⁴² One might think that self-defense situations (and armed conflict more generally) involve greater uncertainty than terrorism interrogation and that therefore, interrogators contemplating torture should have at least as much leeway as private parties and police officers contemplating lethal self-defense or defense of others. If so, interrogational torture of terrorism suspects could be approached under rules like those governing soldiers involved in armed conflict and faced, in their choices, with a substantial chance of killing innocent civilians. In my view, however, this analogy runs in the wrong direction. The law of war governing “collateral damage” has devastating consequences for innocent civilians and for the combatants themselves. See THEODORE NADELSON, TRAINED TO KILL: SOLDIERS AT WAR (2005) (describing the continuing attraction experienced by veterans—even those suffering from post-traumatic stress disorder—for the danger and violence of combat and killing). Moreover, even taking the law of war as given, it should not serve as a template for torture. The very existence of rules governing armed conflict makes evident the assumption that enemy troops pose a lethal threat, in circumstances in which no such assumption could be made confidently in civilian life. There seems room to disagree, but I suspect that the ticking bomb scenario (where there is anything approaching certainty about the various necessary conditions) is quite rare. The ticking bomb poses uncertainty along the same dimension one confronts in the case of self-defense (how likely is it that this person was involved in planting the bomb?) and uncertainty along other dimensions as well (Do I have an involved person? Does the person know anything about how to stop the bomb? Will torture make him give me information he believes to be accurate? Will the information continue to be accurate by the time I obtain it? Can I obtain the information through less extreme means?). In the case of self-defense, the primary uncertainty concerns the intention and capacity of the perceived assailant—if one is right about the assailant’s imminent intentions, then it will ordinarily follow that disabling him is both necessary and effective.

¹⁴³ See *supra* pp. 1444-46, 1450-53 (discussing, respectively, the delegated threat theory and consideration of the similarities and differences between interrogational torture and the heart donor scenario).

rather than negate their suspicions—perhaps a false confession, for example, intended to stop the pain.

The uncertainties that necessarily surround the calculations of an interrogator who tortures a captive make outcomes like Amadou Diallo's death the likely rule rather than the exception. And if we know in advance that such encounters will most often be as destructive and fruitless as the police encounter with the innocent Amadou Diallo was, it may be our duty to avoid the encounters altogether. Interrogational torture, on this approach, is potentially justifiable under a very limited set of circumstances, but the odds that an interrogator will—like Diallo's shooters—see those circumstances everywhere, to devastating effect, might make the most practical approach to torture the same as that embraced by absolutists who see no analogy between self-defense and interrogational torture: never do it, ever.

IV. THE UTILITY OF THOUGHT EXPERIMENTS RECONSIDERED

As we have noted, the ticking bomb scenario is stylized. In reality, we tend not to have complete information, and what is theoretically justifiable may therefore—as a practical matter—never or virtually never be actually defensible. The various cases I have invented in these pages are stylized as well. We are unlikely to encounter in real life the simplicity of the scenarios involving Heart Shooter, Gunshot Victim, and Child Of Victim. Is it therefore inappropriate to consider such questions? Is there something deeply corrupting about entertaining these hypothetical examples?

Some opponents of all torture consider it wrong even to contemplate the ticking bomb scenario. It is seductive, they claim, and replaces reality with a fantasy-based presumption that torture is acceptable.¹⁴⁴ In analyzing this argument, I next consider the literary example of *Sophie's Choice* for the light it sheds on tragic choices.¹⁴⁵ I conclude that thinking about such choices is not inherently corrupt. In doing so, I endorse Michael Walzer's approach to the tragic choice

¹⁴⁴ See Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in TORTURE DEBATE, *supra* note 1, at 118, 128 ("The elusiveness of these criminal conspirators . . . gives rise . . . to daydreams of superman-style rescues. To set policies on the basis of such far-fetched [ticking bomb] scenarios would be folly."); Henry Shue, *supra* note 35, at 57 ("[T]here is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics."); David Luban, *supra* note 86, at 36 ("I . . . suggest that ticking bomb stories are built on a set of assumptions that amount to intellectual fraud . . ."); *id.* at 46 ("The ticking bomb is the picture that bewitches us."); Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE: A COLLECTION, *supra* note 1, at 283-84 (setting forth a similar argument).

¹⁴⁵ See *infra* Part IV.A for a discussion of this novel.

entailed in the ticking bomb scenario.¹⁴⁶

I then conclude, as I began, with the view that an absolute ban on torture is probably best but with the caveat of commentators like Oren Gross that the ticking bomb scenario—and the argument justifying torture in such cases—do not thereby disappear from the moral universe.

A. *Advising Sophie*

Some who defend an absolute ban on torture have said that the “ticking bomb” scenario is a lie.¹⁴⁷ The reality of torture is that captors typically do not know whether there is a ticking-bomb at all or whether—if there is such a bomb—their captive has any useful information about it. People are interrogated and tortured to find out what they know, and there is an operative presumption (by interrogators willing to engage in torture) that captives as a group are “likely enough” to know something to justify their torture. Given that this is the reality of torture “on the ground,” discussions of the ticking bomb scenario seduce us¹⁴⁸ into permitting some torture, after which we’re just “haggling about the price.”¹⁴⁹

At one level, this assessment represents a sort of utilitarian argument against posing and thinking about the ticking bomb scenario. That is, there are some questions that should not be asked, because one has entered a moral danger zone in posing them, a zone from which one will inevitably exit with moral scars. To examine this idea, consider an example from literature. In William Styron’s *Sophie’s Choice*, a woman is faced with a Nazi who directs her to choose which one of her two children will be killed. Sophie initially resists making the choice, but she is led to believe that if she refuses to choose, then both children will die. She concludes that she must therefore make a selection, because that is the only way that she can save either of her children.

¹⁴⁶ See Walzer, *supra* note 3.

¹⁴⁷ See Henry Shue, *supra* note 35, at 57 (“Notice how unlike the circumstances of an actual choice about torture the philosopher’s example is. The proposed victim of our torture is not someone we suspect . . . he *is* the perpetrator. . . . he *did* plant the device.”) (emphasis in original); see also Holmes, *supra* note 144, at 127-28 (“[T]he idea that the authorities might get a dangerous terrorist into their custody, after he has planned an attack but before he has executed it, is a utopian fantasy.”); Luban, *supra* note 86, at 45 (“The ticking time-bomb scenario cheats . . . by stipulating that the bomb is there . . . and that officials know it and they know they have the man who planted it.”).

¹⁴⁸ Luban, *supra* note 86, at 45.

¹⁴⁹ *Id.* at 44. The quotation is a reference to the (likely apocryphal) story usually attributed to George Bernard Shaw in which a woman says she might sell her body for a million dollars but is shocked when asked whether she would sell it for ten. Shaw’s response is to note that she’s already proven herself a whore, and they are now only haggling over price.

She chooses Jan, her son, for life, and Eva, her daughter, for death.¹⁵⁰ She never learns what ultimately happened to Jan.¹⁵¹ The evil of what the Nazi does to Sophie in this story is profound.¹⁵²

First and most obviously, the Nazi kills one and perhaps two innocent young children and thereby also causes unfathomable suffering to their mother. Second, he presents Sophie with her choice, and this too is a moral outrage (for which the novel is named). In addition to losing her children, Sophie is forced—by the choice—to decide between two horrifying options. She can refuse to select one of her children for death and in so doing, guarantee that both children will die. That is, her first choice is to become an accomplice, by inaction, in the death of her babies. She can, instead, in an effort to rescue one of her children, select one or the other child for murder. Her second choice, then, is to spare one of her children by becoming a more active accomplice in the other's death. The third component of the cruelty is to render her decision to choose—and thereby participate actively in killing one of her children—potentially futile. There is little consolation for Sophie: she has surrendered her refusal to participate and, to some degree, has lost both of her children anyway.

What “should” Sophie have done? In one sense, it is presumptuous to suppose that we can opine about what one “ought to” do under such extreme circumstances. Even asking a parent of two children such a question invites an inquiry that is not only sickening to contemplate but potentially devastating to the equality of love and care for each child to which any decent parent aspires. There is no good advice to be given in advance of such situations. Indeed, Sophie's predicament is as poignant and heart-wrenching as it is largely *because* it was so outrageous to place her in the position of having to consider whether and how she would make such a choice in the first place.

If one does engage the moral question of what Sophie “should” have done, however, then the analogue of the anti-interrogational-torture absolutist position might be, “the right thing is to refuse to become an accomplice, to refuse to select one of the children for death. Period.”¹⁵³ As we see in the novel, Sophie's choice may not even, in the end, have saved anyone's life. Becoming complicit in the Nazi's

¹⁵⁰ WILLIAM STYRON, *SOPHIE'S CHOICE* 529 (Vintage Int'l 1992) (1979).

¹⁵¹ *Id.* at 444-50.

¹⁵² Though the Nazi's conduct would surely count as mental torture under the Convention Against Torture, 8 C.F.R. § 208.18(a)(4)(i-iv) (2009), my focus in this section is not on the Nazi's unambiguously evil conduct but on Sophie's response to it. Sophie's position is analogous to that of the interrogator confronting the terrorist who has planted the ticking bomb. Though the analogy is imperfect, because Sophie's children are utterly innocent, one who categorically opposes interrogational torture might find the interrogator's predicament similar to Sophie's.

¹⁵³ In his book, David Daube locates such an approach in Jewish tradition. See DAVID DAUBE, *COLLABORATION WITH TYRANNY IN RABBINIC LAW* (1965).

behavior, like torture, thus may not “work.” Anyone with a modicum of compassion can understand why Sophie does what she does, and no one can fairly judge her individually for doing so. In crafting policy, however, the absolutist’s line would be “never choose one of the children, even if that guarantees that they both will die.”

At first blush, this “advice” makes considerable sense. One ought not to participate in the killing of one’s children. Sophie initially shrank from the very prospect of doing so. Furthermore, maybe—as might have occurred in the story—they will both die anyway and therefore, the consequences will not have made the choice worthwhile. But does this represent a fair assessment of the moral merits of making versus refusing to make a choice?

From Sophie’s perspective—given what she knows at the time she makes her choice—she is asked to decide whether one or both of her children will die. She cannot know whether her tormentor plans to kill both children no matter what she says. We accordingly cannot judge her decision on the basis of information to which she herself has no access (that the Nazi may have no intention of sparing either child and is simply tormenting her for his own amusement). As I have explained in a very different context, we judge a person’s conduct from that person’s perspective, informed by what that person knew or should have known at the time of the conduct.¹⁵⁴

Given what Sophie knew when she made her decision, it is not obvious that she should have remained silent—refrained from participating—when her silence would, so far as she knew, result in two deaths rather than one. Though it might have been purer of her to refuse to engage at all, she was the children’s mother, and her moral obligation was arguably to act in a way that would save as many of them as she could. If we analogize the scenario to that of a burning building, it is by no means clear that a mother should remain passive and do nothing if she has the time and strength to save only one of her two children from the flames.

If the Nazi had simply killed both of her children without asking for her input, then Sophie would never have faced the dilemma. Once confronted with “Sophie’s Choice,” however, she could not escape the dilemma by simply pretending that it had not been presented. Once you have explicitly been given apparent power over life and death—and *apparent* power is all that you can know you have, until you attempt to exercise it—doing nothing is no longer what it once was. And this is particularly true when you have a relationship, as Sophie did, with the

¹⁵⁴ See Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663 (2007); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996).

person over whom such apparent power has been granted.

In considering the choice that faced Sophie, it would therefore seem most accurate, from a moral standpoint, to say that neither option was acceptable. Once a person has confronted the choice, as Sophie did in the novel and as real human beings did during the Holocaust,¹⁵⁵ she is forever changed no matter what she decides. As Michael Walzer said of the practitioner of necessary torture in his 1973 essay,¹⁵⁶ Sophie will have unclean hands. The absolutist can say that refraining from choosing maintains Sophie's purity, but Walzer's analysis exposes the reality that such a statement is a pretense, as much as it is a pretense to say that what Sophie actually did choose to do had no destructive moral implications.

Walzer might say of Sophie what he said of government officials. An official sometimes faces unacceptable choices, as Sophie does. And no matter how he decides to act, an official in the ticking bomb scenario will be left with blood on his hands. It is unavoidable. If he tortures and saves lives, his hands are dirty, though his choice might have been the better of the two. But if he does nothing and victims perish, then he is responsible for their deaths, because it was his duty to take care of them, just as it was Sophie's duty to care for her children.

For Walzer, the person who rightly occupies the position in which he has the power to make such decisions should be one who recognizes these implications, one who feels the immorality of choosing torture in the same way as a mother like Sophie feels the immorality of choosing one of her beloved children for death. And as Jean Bethke Elshtain says,¹⁵⁷ to authorize such torture by guaranteeing a justification defense, much less to bless it in advance by issuing a torture warrant, is to dissipate the competing moral intuitions that make the "Sophie's choice" of torture a tormenting dilemma instead of the blank check that the Bybee memo¹⁵⁸ seemed deliberately to provide.

CONCLUSION

In this Article, I have considered why and indeed whether torture—the deliberate infliction of severe pain and suffering—is qualitatively "different" from death in the way that the U.S. Supreme Court claims that the death penalty is "different" from a term of imprisonment. I have argued that an act of torture is not *inherently*

¹⁵⁵ As a daughter of Holocaust survivors, I know of at least one real-life case of a "Sophie's Choice," ending in the murder of both children, though I am sure there were many others.

¹⁵⁶ See Walzer, *supra* note 3.

¹⁵⁷ See Jean Bethke Elshtain, *supra* note 58, at 84; see also Sullivan, *supra* note 19, at 21-22.

¹⁵⁸ See Bybee Memo, *supra* note 29.

different from or worse than an act of killing, demonstrating through a hypothetical example that torture and death are equally justifiable when deployed in true self-defense. I then asked the related question whether interrogational torture—within the “ticking bomb” situation—is in fact meaningfully distinct from self-defense, the commonly invoked justificatory analogue for interrogational torture.

To explore the comparison between lethal or torturous self-defense, on the one hand, and interrogational torture, on the other, I presented a series of examples in which a wrongdoer harms or threatens to harm an innocent party, and that harm can be avoided or reversed by killing the wrongdoer. I analyzed the examples as revealing three necessary conditions that must accompany any justifiable act of killing or torture intended to save lives.

The first necessary condition is the actor’s having engaged in wrongdoing that threatens death or substantial bodily harm. The second condition is the utility of killing or torturing the actor as a means of promoting the survival and safety of the actor’s innocent victim(s). And the third is that there must exist a tight nexus between the fulfillment of the first and the second conditions. It must be the case, in other words, that the utility of killing or torturing the wrongdoer is in some fundamental manner linked to that actor’s wrongdoing.

I argued that in the case of true self-defense, the link between wrongdoing and utility is necessarily extremely tight—if an actor is trying to kill a victim, it is his attempt to kill the victim that makes killing the actor a successful vehicle for saving the victim. Killing some innocent third party, by contrast, cannot have the desired effect. In the case of interrogational torture, however, the nexus between the first two conditions is substantial but weaker and more contingent than in the case of self-defense. Though it would likely be true that the person to be tortured (successfully) for life-saving information about a terrorist attack is directly implicated in the terrorist plot, it need not be. A person might, for example, know about the plot without having participated or in any way assisted in its execution. Or a person might, alternatively, be utterly ignorant and uninvolved in the plot but be loved by a knowledgeable or guilty party who would be willing to reveal information to prevent the death or stop the torture of the ignorant party. Because interrogational torture could “work” in any one of these scenarios, it is not as clearly justifiable—even in the scenarios in which the first two conditions are actually met—as self-defense is. Because the nexus is strong, however, I conclude that the position that interrogational torture is justified when the first two conditions are met, is more defensible than is torture or homicide in the case in which the first two conditions are linked only by happenstance, as in the hypothetical “Heart Shooter and Heart Donor” scenario that I described.

The “ticking bomb” case is therefore as vexing as it is because it is so close to self-defense yet differs from it enough to generate conflicting intuitions.

Numerous commentators have suggested that the ticking bomb scenario poses the wrong question, because in reality, we lack the information that the ticking bomb scenario presumes.¹⁵⁹ In reality, we ordinarily will not know whether there is a ticking bomb, whether—if there is a ticking bomb—the captive to be tortured has information about it, whether—if the answer to each of the first two inquiries is yes—torturing the captive will enable us to save the threatened lives, and whether, finally, some less ugly alternative approach might have been just as (or more) effective at saving the potential victims.

I would frame this point slightly differently. In the age of terrorism, the ticking bomb scenario will likely confront our leaders on occasion. There are ongoing plots to send suicide bombers to kill and maim innocent civilians, and there are people who have information that—if made known—could permit the frustration of these plots. What we virtually always lack, however, is the capacity to *know* that we are confronting a ticking bomb scenario and to *know* that torturing person X will in fact save innocent people.

This uncertainty complicates our choices. However unstable in its own right, a view about the proper course of action in the ticking bomb scenario in a world in which we are omniscient of everything except for the information held by our captive, does not necessarily entail any particular policy for the actual world in which our ignorance is far greater. As David Luban points out, for example,¹⁶⁰ Michael Moore analogized torture to self-defense in his 1989 article in the *Israeli Law Review*,¹⁶¹ and the Bybee memo embraced that analogy as authority for the proposition that any interrogational torture ordered by the President would constitute “self-defense.” But Moore draws very different conclusions from his theoretical meditation to the real world. He does not argue, as the Bybee Memo does, for the express legalization of torture.

Is torture different from killing? My thought experiments suggest that in cases in which torture literally amounts to self-defense, it is not different. By contrast, interrogational torture, even under conditions of stipulated certainty, is different, but only a little. Life in real time does not, however, come with stipulations, and thus that small theoretical difference may prove to be crucially important in practice.

¹⁵⁹ See Henry Shue, *supra* note 35, at 57; see also Luban, *supra* note 86, at 45.

¹⁶⁰ See *id.* at 63.

¹⁶¹ Moore, *supra* note 27, at 320-25.